

Regulation By Bootstrap: Contingent Management of Hazardous Wastes Under the Resource Conservation and Recovery Act

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In the last few years, EPA has increasingly employed the questionable technique of "contingent management" to regulate wastes under the federal Resource Conservation and Recovery Act (RCRA) in order to limit the costs and avoid the stigma of hazardous waste classification. Through the technique of contingent management, EPA has exempted materials from classification as hazardous waste on the condition that the materials are managed in the particular manner specified in the regulation. The ultimate bootstrap, contingent management allows EPA to regulate non-hazardous wastes over which it has no statutory jurisdiction. Perhaps more troubling, contingent management allows EPA to avoid the specific statutory scheme adopted by Congress for the regulation of hazardous wastes.

Although one case appears to endorse the use of contingent management, the most significant issues raised by this technique have not been addressed. The legality of the contingent management technique is far from clear. Among other things, EPA is relying on the factors of cost and stigma that may not properly be considered in classifying wastes as hazardous, and EPA is avoiding specific statutory requirements that would otherwise apply to hazardous wastes. Furthermore, the rationale used by EPA to justify contingent management is essentially boundless; EPA could potentially eliminate the statutory requirements of RCRA by regulating any otherwise hazardous waste through contingent management. EPA is, in effect, asserting discretion to regulate such wastes in any manner it deems appropriate. This is a position rejected by Congress when it amended RCRA in 1984 to constrain EPA's discretion. Given these concerns, courts should closely scrutinize EPA's use of contingent management and not defer to EPA's construction of its authority under RCRA.

After discussing the rationale and weaknesses of contingent

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management, this Article concludes with recommendations for a more rational and consistent means of classifying and regulating hazardous waste.

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*What's in a name? that which we call a rose
By any other name would smell as sweet¹*

Introduction

The regulatory world of hazardous waste is understood by few but feared by all. Once the dreaded classification of “hazardous” attaches, solid waste becomes a costly pariah. Under the provisions of Subtitle C of the Resource Conservation and Recovery Act (RCRA),² hazardous waste is generally subject to complex and expensive federal requirements relating to its management, treatment, disposal and recycling. Through the “mixture,” “derived-from,” and “contained-in” rules, hazardous waste infects everything with which it comes into contact and subjects otherwise benign materials to the costly Subtitle C requirements. Perhaps worst of all, hazardous waste bears a stigma; it is marked as “unclean.” Industries fear the public reaction to news that they generate or manage “hazardous waste.”

1 WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2. As will become clear, the focus of this article is attempts by EPA to regulate hazardous wastes without calling them hazardous wastes.

2 Resource Conservation and Recovery Act (RCRA) of 1976, §§ 3001-3023, 42 U.S.C. §§ 6921- 6939e (2000).

Given the costs and other consequences of hazardous waste classification, the U.S. Environmental Protection Agency (EPA), has for years explored legal mechanisms to regulate “not very hazardous” wastes. These are wastes that might meet the statutory and regulatory criteria for classification as hazardous wastes but can, in EPA’s view, be adequately controlled without imposing the full set of Subtitle C requirements.³ EPA’s goal has been to minimize the unwanted consequences of hazardous waste classification while ensuring adequate regulatory controls.

EPA has explored a number of regulatory alternatives for regulating “not very hazardous” waste, but three approaches have dominated. First, since the earliest regulation under RCRA, EPA has established separate and reduced requirements for certain types of hazardous waste. In contrast to the full set of regulations normally applicable to hazardous wastes under Subtitle C, these reduced requirements can be understood as “C Minus” regulation. Among other problems, C Minus regulation requires that the waste be classified as hazardous, and thus does not avoid stigmatization.

Second, EPA has considered developing regulatory requirements under Subtitle D of RCRA. Subtitle D authorizes EPA to develop certain regulations relating to the management of non-hazardous solid wastes, and EPA has suggested it could develop “D Plus” regulations applicable to specific types of non-hazardous wastes as an alternative to regulating these wastes as hazardous. EPA has concluded, however, that there are substantial legal obstacles, primarily related to federal enforcement, that limit the effectiveness of federal regulation under Subtitle D.

Finally, EPA has recently focused on a new technique for regulating wastes that avoids hazardous waste classification. Under the general approach called “contingent management” or “conditional exemption,”⁴ EPA has exempted wastes from classification as hazardous waste *on the condition that* the waste is managed in a particular manner specified by regulation. The ultimate “bootstrap,” contingent management regulates non-hazardous wastes under Subtitle C that EPA could not directly regulate under Subtitle D. Perhaps more startling, the use of contingent management may allow EPA to avoid disposal requirements that would otherwise be mandatory for hazardous wastes. Although at least one court has claimed to uphold the legality of the contingent management approach,⁵ the basic legal questions, in fact, have not been addressed. The legality of contingent management is

3 EPA has stated that the full Subtitle C regulatory program is “highly prescriptive and provides little tailoring for site specific conditions.” 64 Fed. Reg. 45,632, 45,642 (1999).

4 EPA appears to use the terms interchangeably, but there may actually be a distinction. See *infra* note 86. This article will use the generic term “contingent management.”

5 *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998). See *infra* notes 109-14 and accompanying text for a discussion of this case.

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questionable, at best.

Viewed in its most favorable light, contingent management involves EPA's attempt to develop a rational set of tailored regulations appropriate to the environmental risk posed by the waste in question. Viewed less favorably, contingent management may involve EPA's attempt to inject considerations, including cost and stigma, into its hazardous waste regulatory decisions in a manner not authorized by RCRA.⁶ Viewed least favorably, contingent management involves EPA's attempt to respond to political pressure from members of the regulated community who resist the full application of RCRA requirements. In fact, all of these factors are no doubt at work in EPA's efforts to develop alternative regulatory schemes for "not very hazardous" waste.

The purpose of this article is to explore the legality and wisdom of EPA's use of contingent management as a regulatory tool under RCRA. The article begins with an analysis of the criteria under RCRA for the classification of materials as solid waste and hazardous waste. The jurisdictional scope of RCRA hinges on these classifications, and EPA claims that contingent management is largely justified as an application of these criteria. Section II of the article addresses the costs and consequences of three more conventional approaches to "not very hazardous" waste regulation under RCRA: full Subtitle C, Subtitle C Minus, and Subtitle D Plus.

Sections III, IV, and V discuss EPA's development of contingent management as a technique for regulating "not very hazardous" waste. These sections include a discussion of EPA's rationale in adopting the contingent management approach and the implications and legality of so doing. The technique of contingent management could have tremendous consequences for the regulation of hazardous waste. As conceived by EPA, contingent management, in principle, is not limited to "not very hazardous" wastes but rather could subsume all of the regulatory requirements of RCRA. Since the legality of contingent management is far from clear, the article discusses the appropriateness of judicial deference to EPA's interpretation.

Section VI offers a suggestion for "rationalizing" EPA's approach to the regulation of hazardous waste. It argues that it would be preferable for EPA to eschew the use of contingent management and adopt distinct categories of hazardous waste. As an extension of its existing regulations, EPA should maintain three categories of wastes, each subject to its own regulatory requirements. First, EPA should establish a class of hazardous wastes subject

6 See *infra* notes 133-135 for a discussion of the role of cost in hazardous waste listing decisions and notes 64-65 for a discussion of the role of cost in developing hazardous waste management standards.

to full Subtitle C requirements. Second, EPA should retain the class of recyclable materials currently subject to its own distinct set of requirements. Third, EPA should create a new class of special wastes subject to a reduced C Minus set of regulations. Such an approach would satisfy EPA's legitimate concerns without raising the troubling legal issues associated with contingent management.

I. Classification of Solid Waste and Hazardous Waste

Federal regulation of solid wastes under RCRA generally follows an all-or-nothing approach. Solid wastes that are classified as hazardous are subject to extensive regulatory controls under Subtitle C;⁷ non-hazardous solid wastes, in general, are not.⁸ Thus, understanding EPA's regulatory options under RCRA starts with the issue of classification of wastes as hazardous or non-hazardous.

A. *The Definitions of Solid Waste*

As implemented by EPA, there are two applicable definitions of solid waste under RCRA, the so-called "dual definitions."⁹ First, the statutory

⁷ See *infra* notes 39-45 and accompanying text for a discussion of conventional regulation of hazardous wastes under RCRA.

⁸ However, at least one class of non-hazardous waste, recycled used oil, may be regulated under Subtitle C. See 42 U.S.C. § 6935 (2000). See *infra* notes 66-84 and accompanying text for a discussion of regulation of non-hazardous waste under RCRA. The volume of non-hazardous waste dwarfs that of hazardous waste. In 1988, EPA estimated that 11 billion tons of non-hazardous industrial and municipal waste were generated in the U.S. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, REPORT TO CONGRESS: SOLID WASTE DISPOSAL IN THE UNITED STATES, EPA/530-SW-88-011B (Oct. 1988). In contrast, EPA reported that regulated hazardous waste generators produced approximately 40.7 million tons of RCRA hazardous waste. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, NATIONAL BIENNIAL RCRA HAZARDOUS WASTE REPORT, EPA/530-S-99-036 at ES-6 (Sept. 1999). Despite limited regulation of this non-hazardous waste by the federal government, the environmental consequence of its disposal is unclear. First, the overwhelming quantities of industrial non-hazardous waste included in these estimates are sludges generated from the treatment of industrial process wastewaters. Those sludges are subject to some regulation under the Clean Water Act. Second, significant amounts of this waste are disposed of in Municipal Solid Waste Landfills (MSWLFs) that are subject to federal regulation under Subtitle D. As discussed below, Congress, in a crucial amendment to RCRA in 1984, gave EPA direct federal authority to enforce compliance with Subtitle D MSWLF criteria. See *infra* note 74. Third, EPA has also established regulations for the disposal of a limited class of wastes produced by "conditionally exempt small quantity generators." 40 C.F.R. § 261.5 (2000). Finally, most states have some programs that regulate the disposal of non-hazardous industrial solid waste not otherwise subject to federal regulation under Subtitle C. See JEFFREY M. GABA & DONALD W. STEVER, THE LAW OF SOLID WASTE, POLLUTION PREVENTION AND RECYCLING, § 10.02 (1999).

⁹ See *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314 (2d Cir. 1993) (discussing the distinction between the regulatory definition of solid waste for purposes of Subtitle C and the statutory definition applied to an "imminent and substantial endangerment" action under § 7003). The coherence of this dual definition has broken down as EPA has used the concept of contingent management to establish regulatory definitions of solid waste that apply to non-Subtitle C wastes. In its Military Munitions Rule, for example, EPA has now established a "contingent" definition of

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definition of solid wastes directly applies to identify those wastes that are subject to regulation as non-hazardous solid wastes under Subtitle D and § 7003 of RCRA.¹⁰ Section 1004(27) defines these “solid wastes” to include certain types of pollution control wastes and “other discarded material, including solid, liquid, semisolid, or contained gaseous material, resulting from industrial, commercial, mining, and agricultural operations and from community activities....”¹¹ In general, application of this definition has not created many difficulties. There are no requirements that a solid waste exhibit some threshold of toxicity or environmental hazard. Rather, the key phrase in the statutory definition is “discarded materials,” and materials that are obviously thrown away or abandoned meet this description.

Second, solid wastes, for purposes of hazardous waste regulation under Subtitle C, are defined in a complex regulatory definition first promulgated by EPA in 1985.¹² These regulatory solid wastes include materials that are abandoned, recycled, or designated as “inherently waste-like.”¹³ In practice, application of EPA’s regulatory definition of solid waste can be extremely difficult.¹⁴ Indeed, interpretation of the definition may be more of an art than a science, and this definition is widely regarded as one of the most complex and confusing regulations in a field not generally known for its clarity.¹⁵

non-hazardous solid waste, in lieu of the statutory definition, for purposes of applying the “imminent and substantial endangerment” provisions of § 7003. *See* 40 C.F.R. § 266.202.

10 *See* 40 C.F.R. § 257.2 (2000) (codifying statutory definition of solid waste for purposes of sanitary landfill criteria under Subtitle D); § 261.1(b)(2)(ii) (section 7003 is governed by statutory elements); *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Auth.*, 888 F.2d 180 (1st Cir. 1989) (discussing application of statutory definition of solid waste under §§ 7002-7003). *See infra* notes 66-83 and accompanying text for a discussion of the requirements of Subtitle D and § 7003. Additionally, EPA claims that the statutory definition applies for purposes of inspection and monitoring authority under §§ 3007 and 3013. 40 C.F.R. § 261.1(b)(2)(i).

11 42 U.S.C. § 6903(27). The statutory definition also contains certain exemptions from classification as solid waste including domestic sewage, industrial discharges regulated under the Clean Water Act, and certain nuclear material. *Id.*

12 40 C.F.R. § 261.2(a). This definition applies solely for purposes of determining materials that are hazardous wastes to be regulated under Subtitle C. *Id.* § 261.1(b)(1) (“The definition of solid waste contained in [Part 261] applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA.”).

13 *Id.* § 261.2(a)(2). In general, abandoned wastes are materials that are thrown away or otherwise permanently discarded. *See id.* § 261.2(b). Recycled wastes are materials that meet a complex test EPA developed to identify those types of recycling that warrant regulation under RCRA. *Id.* § 261.2(c). Inherently waste-like materials include a very limited number of materials that EPA has specifically designated as wastes. *Id.* § 261.2(d).

14 *See generally* Jeffrey M. Gaba, *Separating Chaff from Wheat: Solid Waste and Recycled Materials Under RCRA*, 16 *ECOLOGY* L.Q. 623, 666 (1989) (arguing that, “given the structure and contradictory objectives of the statute and the complexity of the problem, there was virtually no way that the Agency could have developed a clear, comprehensive, and rational definition”).

15 *See, e.g., United States v. White*, 766 F. Supp. 873 (E.D. Wash. 1991) (holding that plaintiff could be prosecuted for violating hazardous waste regulations, despite plaintiff’s arguments that the regulations violated due process because of their vagueness).

B. *Classification of Hazardous Waste*

Hazardous wastes under Subtitle C are a subset of regulatory solid wastes that either exhibit a hazard characteristic or have been listed as hazardous by EPA.¹⁶ Additionally, through application of the mixture, derived-from, and contained-in rules, otherwise non-hazardous wastes may be classified as hazardous if they contain or are derived from a hazardous waste.

1. Characteristic Hazardous Wastes

A solid waste may be classified as a hazardous waste if it exhibits any one of four hazard characteristics promulgated by EPA: ignitability, corrosivity, reactivity and toxicity.¹⁷ The characteristic of ignitability measures the waste's ability, obviously enough, to catch fire.¹⁸ The characteristic of corrosivity identifies wastes that are extremely acidic or basic.¹⁹ The characteristic of reactivity identifies wastes that may explode or otherwise be reactive and unstable.²⁰ The characteristic of toxicity identifies those wastes that contain components that could be released into the environment at levels posing a risk to health or the environment.²¹ A waste exhibits the toxicity characteristic, however, only if a liquid extract of the waste contains one of thirty-eight listed constituents above defined regulatory levels.²²

Any waste may exhibit a hazard characteristic, and it is the responsibility of the generator to determine—either through testing the waste or by guessing (otherwise known as applying “knowledge of process”)—whether a waste exhibits such a characteristic.²³

16 RCRA defines a “hazardous waste” as a solid waste which 1) causes or significantly contributes to risk of death or serious disease or 2) may “pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.” 42 U.S.C. § 6903(5) (2000). Additionally, § 3001(a) requires EPA to develop criteria for identifying the characteristics of or listing hazardous waste “which should be subject to the provisions” of Subtitle C taking into account certain factors relating to the waste's toxicity. 42 U.S.C. § 6921(a).

17 40 C.F.R. § 261.20 (2000).

18 *Id.* § 261.21.

19 *Id.* § 261.22.

20 *Id.* § 261.23.

21 *Id.* § 261.24.

22 *Id.* § 261.24 tbl. 1. EPA also specifies a procedure, known as the Toxicity Characteristic Leachate Procedure (TCLP), for generating a liquid extract from a solid waste. § 261.24(a). Only if the extract of the waste contains high enough levels of the constituents will the waste exhibit the toxicity characteristic. *Id.* Thus, a waste containing pure dioxin would not exhibit the toxicity characteristic since dioxin is not one of the thirty-eight listed constituents.

23 *Id.* § 262.11.

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2. Listed Hazardous Wastes

EPA has designated or listed certain solid wastes as hazardous wastes.²⁴ A waste that falls within the listing description is automatically classified as a hazardous waste and the generator need not test it. In general, only through a petition to EPA to “de-list” the waste can a listed hazardous waste shed its classification.²⁵

EPA has promulgated regulations, found at 40 C.F.R. § 261.11, that specify the criteria it uses to determine whether to list a waste as hazardous. Under § 261.11, a waste may be listed as hazardous if it meets any one of three criteria.²⁶ Under subsections (a)(1) and (a)(2), a waste may be listed if it exhibits a hazard characteristic²⁷ or satisfies certain criteria establishing a high level of toxicity.²⁸ Few hazardous wastes, however, have been listed solely based on these criteria.²⁹

Subsection (a)(3) contains the criteria by which most wastes have been listed. Under this subsection, a waste may be listed if it contains one of a large number of designated hazardous constituents—the “Appendix VIII” constituents—and EPA concludes that the waste is “capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed.”³⁰ The subsection further specifies a series of balancing factors to be assessed in making this determination.³¹ These balancing factors relate to

24 EPA has published three different lists of wastes. *Id.* § 261.31 (wastes from non-specific sources, such as certain spent solvents), *Id.* § 261.32 (wastes from specific sources, such as certain wastes from the petroleum refining industry), *Id.* § 261.33 (discarded commercial chemical products).

25 *Id.* § 261.4(d)(2). Under the mixture and derived from rules, even wastes containing only small amounts of listed waste will be classified as a listed hazardous waste. *See infra* notes 36-38 and accompanying notes for a discussion of these rules.

26 *Id.* § 261.11.

27 *Id.* § 261.11(a)(1).

28 *Id.* § 261.11(a)(2). Under subsection (a)(2), a waste may be listed if the waste itself is fatal to humans at low doses, meets certain levels of animal toxicity, or is capable of causing “an increase in serious irreversible, or incapacitating reversible, illness.” Wastes listed on this basis are designated as “Acute Hazardous Waste.” *Id.*

29 *Id.* §§ 261.31-.33. EPA’s lists contain codes specifying the basis on which wastes are listed. Only a few wastes, primarily those related to munitions, have been listed solely because they exhibit a characteristic. A limited number of wastes have been listed in § 261.31 because they are acutely hazardous. Consistent with the overall clarity of EPA hazardous waste regulations, acutely hazardous wastes are identified by the waste code (H). *See id.* § 261.30.

30 *Id.* § 261.11(a)(3).

31 The subsection (a)(3) factors are:

- (i) The nature of the toxicity presented by the constituent.
- (ii) The concentration of the constituent in the waste.
- (iii) The potential of the constituent or any toxic degradation product of the constituent to migrate from the waste into the environment under the types of improper management considered in paragraph (a)(3)(vii) of this section.
- (iv) The persistence of the constituent or any toxic degradation product of the constituent.
- (v) The potential for the constituent or any toxic degradation product of the constituent to

the waste's toxicity, plausible mismanagement scenarios, action taken by other government agencies or "other factors as may be appropriate."³²

In contrast to the application of the hazard characteristics, there is no simple numerical standard for the listing of hazardous wastes; application of the criteria in 40 C.F.R. § 261.11, particularly application of the balancing factors in subsection (a)(3), involves an exercise of judgment by EPA.³³ EPA has claimed that it does not have a mandatory duty to list a waste that may satisfy the listing criteria, and courts have generally been deferential to EPA's judgment.³⁴ However, courts have required an adequate justification of EPA's assessment of the criteria.³⁵

3. Mixture, Derived-from, and Contained-in Rules

Wastes also may be "transformed" into hazardous wastes based on their contact with a listed hazardous waste. Under EPA's mixture rule, mixtures of listed hazardous wastes and non-hazardous wastes are classified as hazardous

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- degrade into non-harmful constituents and the rate of degradation.
 - (vi) The degree to which the constituent or any degradation product of the constituent bioaccumulates in ecosystems.
 - (vii) The plausible types of improper management to which the waste could be subjected.
 - (viii) The quantities of the waste generated at individual generation sites or on a regional or national basis.
 - (ix) The nature and severity of the human health and environmental damage that has occurred as a result of the improper management of wastes containing the constituent.
 - (x) Action taken by other governmental agencies or regulatory programs based on the health or environmental hazard posed by the waste or waste constituent.
 - (xi) Such other factors as may be appropriate.

Id.

32 Wastes listed on this basis are designated as "toxic wastes." *Id.* It is important to note that wastes that are listed as toxic wastes are not listed because they exhibit the toxicity characteristic. A waste may be listed as a toxic waste on a far broader basis than that used by generators to determine if a waste exhibits the toxicity characteristic. *Id.*

33 In 1994, in the preamble to a particular listing decision, EPA published a "Hazardous Waste Listing Determination Policy" in which it described "the general approach the Agency uses for determining whether to list waste as hazardous pursuant to 40 C.F.R. § 261.11(a)(3)." 59 Fed. Reg. 66,072, 66,073 (1994).

34 See, e.g., 57 Fed. Reg. 37,284, 37,288 (1992) (EPA statement of listing discretion); *Env'tl. Def. Fund. v. EPA*, 852 F.2d 1309 (D.C. Cir. 1988). In *Natural Res. Def. Council v. EPA*, 25 F.3d 1063 (D.C. Cir. 1994), the court rejected a claim that EPA has a mandatory duty to list wastes that exhibit a hazard characteristic and thus satisfy the (a)(1) criterion. The court stated further that EPA had discretion whether or not to list a waste under subsection (a)(3). *Id.* at 1069. The court wrote that "[s]uch a choice seems particularly reasonable with respect to the subsection (a)(3) criterion, whose multi-factor balancing test still leaves a great deal of room for the exercise of agency expertise." *Id.*

35 See, e.g., *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) (remanding the relisting of certain metal smelting wastes because EPA failed to offer an adequate explanation of its response to certain technical data). Additionally, courts have limited EPA's consideration to the listed factors. See, e.g., *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 270 (D.C. Cir. 1988). Courts have held that EPA must address each of these factors in making its listing decisions. See, e.g., *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1398 (D.C. Cir. 1996); *Natural Res. Def. Council v. EPA*, 25 F.3d 1063 (D.C. Cir. 1994).

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even if they contain only small quantities of hazardous constituents and do not exhibit a hazard characteristic.³⁶ Under the derived-from rule, wastes that are generated from the treatment of listed wastes are classified as hazardous regardless of their current toxicity.³⁷ Finally, under EPA's contained-in rule, certain wastes, such as soil or groundwater, generated from the remediation of hazardous waste sites may be classified as hazardous if they contain some unspecified quantity of listed wastes.³⁸

These rules greatly expand the potential universe of wastes that are technically classified as hazardous but may not pose an environmental threat. In fact, application of these rules may be among the most significant consequences of listing a waste as hazardous since listed wastes, unlike characteristic hazardous wastes or non-hazardous wastes, have the power to transform other wastes into hazardous wastes.

II. Conventional RCRA Regulation and its Discontents

A. Full Regulation under Subtitle C

Solid wastes that are classified as hazardous, either by listing or by exhibiting a hazard characteristic, are normally subject to extensive and expensive regulations under Subtitle C of RCRA.³⁹ Subtitle C establishes what is routinely described as a "cradle to grave" system that regulates hazardous wastes from their point of generation to their final disposal.⁴⁰ The central elements of this regulatory scheme include certain on-site management and storage restrictions on generators,⁴¹ manifest obligations that require tracking of transported wastes,⁴² land disposal restrictions,⁴³ and an obligation to dispose of the hazardous waste only at a facility that satisfies

36 40 C.F.R. § 261.3(a)(2)(iii)-(iv). Mixtures of characteristic (as opposed to listed) hazardous waste and non-hazardous waste are classified as hazardous only if the resulting mixture exhibits a hazard characteristic. *See generally* GABA & STEVER, *supra* note 8, § 2.05.

37 40 C.F.R. § 261.3(c)(2)(i) (2000). Wastes generated from the treatment of hazard characteristic wastes are not classified as hazardous unless the derived from waste itself exhibits a hazard characteristic. *Id.*

38 This contained-in interpretation applies largely as a result of a series of EPA statements and guidance documents. EPA has formally promulgated this provision only with respect to a very limited class of "debris." *See* GABA & STEVER, *supra* note 8, § 2.05[4].

39 *See, e.g.*, 40 C.F.R. § 262 (2000) (requirements applicable to hazardous waste generators); § 263 (transporter requirements); § 264 (requirements applicable to treatment, storage and disposal facilities); § 265 (requirements applicable to "interim status" treatment, storage and disposal facilities).

40 *See, e.g.*, DONALD W. STEVER, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE §§ 5.03-.07 (2000).

41 40 C.F.R. §§ 262.10-.44 (2000).

42 *Id.* §§ 262.20-.23.

43 *Id.* §§ 268.1-.50.

Subtitle C requirements, known as “treatment, storage, or disposal facilities” or “TSDFs.”⁴⁴ TSDFs generally must obtain a federally mandated RCRA permit, and to obtain this permit, facilities must meet a variety of technical and financial criteria.⁴⁵ For generators, perhaps the most significant costs from RCRA stem from the requirement to dispose of wastes only at a permitted facility. For disposal facilities, including industries that seek to dispose of wastes on-site, there are substantial costs associated with the TSDF permit requirements.

B. Reduced Regulatory Obligations under Subtitle C: Subtitle C Minus

Since the inception of the RCRA program, EPA has either applied or proposed to apply reduced requirements to certain types of hazardous wastes or hazardous waste management practices. These include:

Recycled Wastes. Since 1980, EPA has imposed reduced requirements on hazardous wastes that are recycled in certain ways.⁴⁶ These requirements eliminate some of the basic elements of the full Subtitle C program.⁴⁷

Universal Wastes. In order to encourage the recycling of certain wastes, EPA in 1995 promulgated a reduced set of requirements applicable to certain persons who generate or store a limited class of so-called universal wastes, including batteries, pesticides, and mercury-containing thermostats.⁴⁸ Persons who actually recycle or dispose of these wastes, however, remain subject to the full set of hazardous waste requirements.⁴⁹

Waste Samples and Treatability Study Samples. EPA has established separate and reduced requirements for hazardous wastes that are collected for purposes of testing to determine the waste’s “characteristic or composition” (waste samples) or for conducting “treatability studies” (treatability study

44 42 U.S.C. § 6928(d) (2000) (making it a crime to knowingly treat, store or dispose of a hazardous waste without a permit).

45 *Id.* §§ 6925-6926; 40 C.F.R. §§ 264-265 (containing the regulatory requirements that must be satisfied to obtain a RCRA permit authorizing operation as a “treatment, storage or disposal facility”).

46 *E.g.*, 40 C.F.R. §§ 266 (containing tailored requirements applicable to wastes recycled by “use constituting disposal”); 266.20-.23 (involving some forms of land application such as use of wastes in fertilizers); 266.70 (detailing reclamation of precious metals); 266.80 (discussing spent lead-acid batteries); 266.100-.122 (regarding the burning of wastes in boilers and industrial furnaces). Boiler and industrial furnaces, for example, are subject to different permit requirements and emission limitations than those that would apply to a hazardous waste incinerator. *Id.*

47 EPA, in March 2000, also relaxed the storage requirements for certain types of electroplating sludges that are recycled. EPA claimed the authority to establish these reduced requirements for the sludges based on arguments that the new requirements will encourage recycling while protecting “public health and the environment.” 65 Fed. Reg. 12,378, 12,380-83 (2000).

48 40 C.F.R. §§ 273.1-.56 (1999).

49 *See generally* GABA & STEVER, *supra* note 8, at § 9.12.

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samples).⁵⁰

Special Wastes. In 1978, EPA proposed the creation of a class of special wastes that would be subject to reduced regulatory requirements. These special wastes would have consisted of certain low-toxicity and high-volume wastes including cement kiln dust, utility waste, mining wastes and oil and gas production wastes.⁵¹ This proposal generated “widespread and divergent protest from the regulated community and the public,”⁵² and EPA abandoned the distinct classification of special wastes when it adopted its current system of hazardous waste classification.⁵³ Congress subsequently adopted specific statutory requirements applicable to these wastes.⁵⁴

EPA has consistently claimed the authority to adopt reduced requirements for hazardous waste under Subtitle C.⁵⁵ EPA’s rationale for these C Minus regulations appears to be that the reduced requirements satisfy the statutory standard of protection of “human health and the environment.”⁵⁶ This justification has been based on the minimal environmental threat from the wastes, the existence of other economic and regulatory incentives for proper management, and concerns that additional restrictions will discourage recycling.⁵⁷

There are, however, a number of problems with this approach. First, this approach requires that the waste first be designated as hazardous. To the extent that EPA and the regulated community fear the stigma of hazardous waste classification, C Minus regulation does not avoid the problem.

Second, there are specific statutory requirements applicable to the disposal of hazardous waste that may not be eliminated by EPA. Although EPA is authorized to establish such requirements “as may be necessary to protect human health and the environment,”⁵⁸ there are elements of

50 40 C.F.R. §§ 261.4(d) (waste samples), 261.4(e) (treatability study samples) (2000). EPA has characterized these rules as “conditional exemptions.” 53 Fed. Reg. 27,290 (1998). They are not. The wastes subject to these rules remain classified as hazardous waste, but they are subject to specific, and less stringent, regulation.

51 43 Fed. Reg. 58,946 (1978).

52 45 Fed. Reg. 33,174 (1980).

53 45 Fed. Reg. at 33,173-75. Among other things, EPA stated that the new toxicity and corrosivity characteristics would cause fewer of these wastes to be classified as hazardous. *Id.*

54 See generally GABA & STEVER, *supra* note 8, §§ 6.01-6.06.

55 In its recent proposal to establish contingent management requirements for cement kiln dust, EPA, for example, identified development of “tailored standards under Subtitle C” as a regulatory alternative. 64 Fed. Reg. 45,632-41 (1999).

56 See *infra* note 65.

57 See, e.g., 65 Fed. Reg. 12,380-83 (2000) (justification for reduced regulation of electroplating sludges); 46 Fed. Reg. 47,426 (1981) (justification for reduced requirements for waste and treatability study samples).

58 42 U.S.C. § 6922(a) (2000) (standard applicable to generator requirements); § 6923(a) (standard applicable to transporter requirements). Section 3004(a) of RCRA also establishes a general standard that requirements for TSDFs be “necessary to protect human health and the environment.” §

regulation under Subtitle C that are mandated by statute. Under §§ 3004(b)-(k) and (m), for example, certain forms of land disposal of hazardous waste are prohibited by statute, unless they comply with regulatory requirements established by EPA.⁵⁹ There are also a number of statutorily prescribed conditions on TSDFs, including "minimum technological requirements" for certain types of waste disposal,⁶⁰ and substantial financial responsibility obligations.⁶¹ The statute also imposes a "corrective action" requirement—an obligation to remediate past releases of solid wastes—on facilities obtaining a TSDF permit.⁶² The legislative history of RCRA indicates that Congress intended these mandatory provisions as a limitation on EPA's discretion to fashion a regulatory program under RCRA.⁶³

Third, Subtitle C does not give EPA the express authority to consider cost in developing regulations.⁶⁴ The basic statutory standard is protection of human health and the environment, and Congress has, only in limited cases, expressly authorized EPA to consider cost as a factor in its regulatory decisions.⁶⁵ This seems to place substantial limits on EPA's ability to tailor regulations based on concerns for the cost of full Subtitle C regulation. Any justification of reduced requirements would presumably have to be limited to claims that the public health and environment were adequately protected with reduced regulation.

C. Subtitle D and Subtitle D Plus

Subtitle D is that portion of RCRA most directly applicable to the regulation of non-hazardous solid waste.⁶⁶ Two elements of RCRA form the

6924(a). The section, however, specifies seven general requirements that must be included. §§ 6922(a), 6923(a), 6924(a).

59 See generally GABA & STEVER, *supra* note 8, § 3.04 for a discussion of "land disposal restrictions" and the "land ban."

60 42 U.S.C. § 6924(o).

61 *Id.* § 6924(t).

62 *Id.* § 6924(u).

63 See *infra* notes 138-139.

64 EPA has apparently concluded that it does not have the authority to consider the cost of regulation in establishing disposal standards. In its "Regulatory Determination" not to list certain mining wastes as hazardous, EPA stated that its general authority under § 3004(a) to establish such standards does not include the "flexibility to consider the economic impact of regulation." 51 Fed. Reg. 24,496, 24,500 (1986). See also *Env'tl. Def. Fund v. EPA*, 852 F.2d 1309, 1313 (D.C. Cir. 1988) (noting EPA's conclusion that § 3004(a) does not grant authority to consider the economic impact of regulation).

65 Section 3004(x), for example, provides special authority to regulate "hazardous" mining wastes based on consideration of the cost of regulation. 42 U.S.C. § 6924(x). Section 4010(c) allows EPA to "take into account the practicable capability" of facilities in developing criteria for Municipal Solid Waste Landfills receiving certain types of hazardous waste. 42 U.S.C. § 6949a(c). In *Sierra Club v. EPA*, 992 F.2d 337 (D.C. Cir. 1993), however, the court held that the statute required development of groundwater monitoring standards for all landfills, and that this consideration could not be waived based on consideration of cost.

66 Resource Conservation and Recovery Act (RCRA) of 1976, §§ 4001-4010, 42 U.S.C. §§

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basis for control of non-hazardous waste under Subtitle D. First, Subtitle D contains a federal prohibition on the open dumping of non-hazardous solid waste.⁶⁷ Second, two provisions of RCRA, §§ 1008(a)(3) and 4004(a), authorize EPA to define acts that constitute open dumping through establishment of “sanitary landfill criteria.”⁶⁸ EPA has promulgated sanitary landfill criteria that form the base program under Subtitle D.⁶⁹

Given the apparent breadth of this authority, EPA has suggested that it might regulate some classes of “not very hazardous” waste by establishing tailored sanitary landfill criteria for specific solid wastes.⁷⁰ These would be Subtitle D Plus requirements, and violation of these requirements would constitute prohibited open dumping.

There is, however, a significant problem with basing a federal regulatory scheme on Subtitle D. The open dumping prohibition, although enforceable by states⁷¹ and private citizens,⁷² is not directly enforceable by

6941-6949a (2000). Subtitle D has a variety of interrelated provisions that establish minimal requirements for the disposal of non-hazardous solid wastes. *See generally* GABA & STEVER, *supra* note 8, at § 3.02.

67 42 U.S.C. § 6945(a).

68 Under § 1008(a)(3), EPA must develop guidelines to provide minimum criteria to be used by States to define “open-dumping.” 42 U.S.C. § 6907(a)(3). Under § 4004(a), EPA is authorized to promulgate regulations to determine “which facilities shall be classified as sanitary landfills and which shall be classified as open dumps.” *Id.* § 6944(a). The 4004(a) regulations are to be based on the standard of “no reasonable probability of adverse effects on human health or the environment.” *Id.* EPA is also authorized to classify different types of sanitary landfills. *Id.*

In 1984, Congress provided additional authority for EPA to establish criteria for facilities receiving household hazardous waste and hazardous wastes from conditionally exempt small quantity generators. *Id.* § 6949a(c). In establishing these criteria, EPA may consider not only the need to protect “human health and the environment” but also the “practicable capability of such facilities.” This apparently allows consideration of economic factors not explicitly recognized under the standards in §§ 1008(a)(3) and 4004(a). EPA, in reliance on this authority, has established detailed and stringent requirements applicable to Municipal Solid Waste Landfills (MSWLFs). *See* 40 C.F.R. §§ 258.1-.75 (1999). EPA has also promulgated criteria applicable to a limited class of non-municipal landfills that receive wastes from Conditionally Exempt Small Quantity Generators (CESQGs). *Id.* §§ 257.5-.30.

69 Under the authorities of §§ 1008(a)(3) and 4004(a), EPA has established general criteria defining “sanitary landfills” in 40 C.F.R. § 257.1-.4.

70 *See, e.g.*, 56 Fed. Reg. 27,300 (1991) (discussing the use of Subtitle D Plus requirements for certain mining wastes); 53 Fed. Reg. 25,456 (1988) (discussing alternatives for regulating certain oil and gas production wastes that it excluded from classification as hazardous); 51 Fed. Reg. 24,496, 24,500 (1986) (discussing use of Subtitle D for mining wastes).

71 States are required, as part of their “state management plans,” to prohibit open-dumping, *see* 40 C.F.R. § 256.23, and violations of this requirement should be enforceable in state courts as a matter of state law. EPA, however, has apparently disclaimed the authority to compel states to adopt enforceable state equivalents of specific Subtitle D standards. In a recent description of its regulatory options, EPA wrote that it may “encourage States to adopt standards developed under Subtitle D as enforceable standards under State law, but the Agency could not compel them to do so.” 64 Fed. Reg. 45,632-40 (1999).

72 Early case law split over whether citizens could use the citizen suit provisions in § 7002(a)(1)(A) to sue persons alleged to be in violation of the § 4005(a) federal open-dumping prohibition. In *O’Leary v. Moyer’s Landfill*, 523 F. Supp. 642 (E.D. Pa. 1981), for example, the court held that a federal citizen suit could be brought directly against persons in violation of § 4005(a). *Id.* at 654. In contrast, the court in *City of Gallatin v. Cherokee County*, 563 F. Supp. 940 (E.D. Tex. 1983), held that the open-dumping prohibition could not be enforced through a citizen suit.

the federal government.⁷³ Although RCRA contains significant civil and criminal penalties, they generally only apply for violation of the hazardous waste provisions of Subtitle C.⁷⁴ EPA has identified the lack of enforcement authority as the primary problem with adopting a regulatory scheme based on Subtitle D Plus standards.⁷⁵

There are several issues, in addition to federal enforcement, that may limit the application of a Subtitle D Plus approach. First, there is the basic question of whether EPA has the authority to develop sanitary landfill criteria applicable to specific classes of non-hazardous waste. Section 4004(a) specifically authorizes criteria to "provide for the classification of different types of sanitary landfills,"⁷⁶ and this certainly implies the discretion to develop different criteria applicable to different types of wastes. Although § 1008(a)(3) is less clear on the standards for sanitary landfill criteria, what guidance is given seems to allow for variation in standards based on the characteristics of the landfill rather than the waste.⁷⁷ EPA has consistently claimed, however, the authority to establish tailored Subtitle D

Congress resolved this issue by amending § 4005 in 1984 specifically to authorize citizen suits under § 7002 against persons in violation of the open-dumping prohibition. The 1984 Amendment added the following sentence to § 4005(a): "The prohibition contained in the preceding sentence [the federal open-dumping prohibition] shall be enforceable under § 6972 of this Title against persons engaged in an act of open-dumping."

Congress also apparently precluded citizen suits against states or the federal government to compel enforcement of the open-dumping prohibition. See H.R. Rep. No. 198, at 53-4, *reprinted in* 1984 U.S.C.A.N. 5576, 5612-13. Courts had previously reached different conclusions on this issue. Compare *Ringbolt Farms Homeowner's Ass'n v. Town of Hull*, 714 F. Supp. 1246 (D. Mass. 1989) (citizen suits not authorized against state for state's failure to enforce the prohibition) with *City of Gallatin v. Cherokee County*, 563 F. Supp. 940 (E.D. Tex. 1983) (citizen suit may "perhaps" be brought against EPA or a state for failure to enforce).

73 In the preamble to its "Open Dumping" section, EPA wrote: "The Federal Prohibition may be enforced in Federal District court through the citizen suit provisions in Section 7002 of RCRA. The Act does not give EPA authority to take legal action against parties that may violate the open-dumping prohibition." 46 Fed. Reg. 29,064 (1981). EPA continues to hold this interpretation of the statute. See, e.g., 64 Fed. Reg. 45,632, 45,640 (1999) (stating that standards developed under Subtitle D "would not be directly enforceable by EPA under the enforcement authorities of §§ 3007 and 3008").

74 Section 3008(a), for example, authorizes EPA to issue compliance orders for violation of "this subchapter" (i.e. Subtitle C). 42 U.S.C. § 6928(a) (2000). Section 3008(d) authorizes criminal prosecution of persons who violate certain requirements relating to "hazardous waste identified or listed under this subchapter." 42 U.S.C. § 6928(d). In recognition of this limitation on enforcement authority, Congress amended RCRA in 1984 specifically to allow federal enforcement of two specific types of Subtitle D criteria. Section 4005(c) now provides that the federal government may, using the authority § 3008, bring a federal action to enforce the open-dumping prohibition against violation of MSWLF and CESQG criteria in states that have not developed approved programs for these facilities. 42 U.S.C. § 6945(c)(2).

75 See, e.g., 64 Fed. Reg. 45,632, 45,640 (1999).

76 42 U.S.C. § 6944(a).

77 Section 1008(a) guidelines, in general, are described as including "minimum information for use in deciding the adequate location, design, and construction of facilities associated with solid waste management practices including the consideration of regional, geographic, demographic, and climatic factors." *Id.* § 6907(a).

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Plus requirements.⁷⁸

Second, for wastes that otherwise might be classified as hazardous, there is the issue of whether EPA may elect to regulate under Subtitle D in lieu of Subtitle C. In *Environmental Defense Fund v. EPA*,⁷⁹ the court held that EPA could decline to regulate certain mining wastes as hazardous and rely instead on regulation under Subtitle D.⁸⁰ This conclusion, however, was based in part on RCRA provisions that specifically address this class of mining wastes. Therefore, the *Environmental Defense Fund* opinion should not be read to suggest that EPA has general authority to base a listing decision on its preference for regulation under Subtitle D rather than C. At least one court, however, has upheld an EPA decision declining to list a waste based on the existence of regulatory programs established by other regulatory agencies.⁸¹ Thus, a limited extension of these cases supports the conclusion that EPA could decline to regulate a waste as hazardous due to the existence of other regulations legally adopted under Subtitle D.

D. *Imminent and Substantial Endangerment under Section 7003*

There is an additional provision that authorizes limited federal control over disposal of non-hazardous wastes. Under § 7003, EPA may issue an administrative order or the government may seek injunctive relief to prevent “an imminent and substantial endangerment” arising from the management or disposal of “any solid waste or hazardous waste.”⁸² EPA and the courts have concluded that this authority extends to the broad statutorily defined class of solid wastes.⁸³ Violations of 7003 administrative orders are punishable by fines of up to \$5,000 per day. Although this fine is substantially less than the penalties available for violations of Subtitle C, it does constitute a mechanism for federal enforcement, at least on a case-by-case basis, of activities that constitute the mismanagement of non-hazardous solid waste.⁸⁴

78 In its decision to regulate certain mining wastes under Subtitle D rather than Subtitle C, EPA recognized that the existing Part 257 criteria were “not appropriate” for mining wastes. The Agency stated, however, that it “believes that it can design and implement a program specific to mining wastes under Subtitle D that addresses the risks associated with such waste.” 51 Fed. Reg. 24,496, 24,500 (1986). EPA has made similar statements with respect to regulation of oil and gas exploration and production wastes that it has excluded from regulation under Subtitle C. See 53 Fed. Reg. 25,456 (1988).

79 852 F.2d 1309 (D.C. Cir. 1988).

80 Although, in fact, EPA did not promulgate specific Subtitle D Plus regulations for these mining wastes, it did indicate that it might develop such regulations. See 51 Fed. Reg. 24,496 (1986).

81 *Natural Resource Defense Council v. EPA*, 25 F.3d 1063 (D.C. Cir. 1994).

82 42 U.S.C. § 6973(a) (2000).

83 See *supra* note 9 and accompanying text.

84 In its military munitions regulation, EPA has stated that it will rely on its authority under § 7003 to address problems related to certain types of military munitions wastes that have been excluded from the regulatory definition of solid waste. 40 C.F.R. § 266.202(d) (1999).

III. Regulation by Bootstrap: Contingent Management of "Not Very Hazardous" Waste

Given the limitations of the Subtitle C, C Minus and D Plus approaches, EPA has explored various alternatives to regulation under RCRA.⁸⁵ Increasingly EPA has relied on the questionable technique of contingent management or conditional exclusion.⁸⁶ Through this approach, EPA has tried to have it all—enforceable regulation without the cost and stigma of hazardous waste classification.

A. *The Concept of Contingent Management*

The concept of contingent management is deviously simple, or in EPA's terms a "creative, affordable and common sense approach."⁸⁷ EPA excludes a waste from classification as hazardous *on the condition that* it is managed in compliance with specific regulatory requirements. In other words, EPA establishes a set of requirements that apply to a waste that, by virtue of the exclusion, is classified as a non-hazardous solid waste. Non-compliance with the requirements converts the waste into a hazardous waste, and the party

85 In its 1999 proposal to establish contingent management requirements for cement kiln dust, EPA provided perhaps its fullest discussion of its possible alternatives for regulation of "not very hazardous" waste. 64 Fed. Reg. 45, 632, 45,639-43 (1999). In addition to the three major alternatives discussed in this article, EPA identified several possibilities:

- (i) Adoption of management guidelines to be used by states in adopting their own enforceable requirements. Under this approach, EPA would adopt a contingent management requirement only if states elected not to adopt state standards.
- (ii) Adoption of a "Memorandum of Understanding" with the affected industry, through which the industry would voluntarily accept enforceable restrictions. In effect, this would be an application of an enforceable agreement approach, as previously suggested by EPA, through which EPA would negotiate the imposition of restrictions to be accepted through a voluntary agreement (of questionable enforceability) with industry. See 59 Fed. Reg. 66,079 (1999) (discussing the possible use of "enforceable agreements" between EPA and industry).
- (iii) Use of authority under § 7003 of RCRA to abate an "imminent and substantial endangerment" arising from the improper management of solid or hazardous waste.
- (iv) Enforcement of contingent management standards under Subtitle C without having to identify the waste as hazardous, as suggested by a trade association.

64 Fed. Reg. 45, 632, 45,639-43 (1999).

86 EPA appears to use the terms interchangeably, but there may actually be a distinction. Compare 64 Fed. Reg. 46,476-80 (1999) (describing proposed conditional listing of chlorinated aliphatic wastes as "contingent management") with 64 Fed. Reg. 10,064 (1999) (describing proposed exemption of mixed low-level radioactive wastes as "conditional exemption."). As discussed above, a waste may be hazardous either because it exhibits a hazard "characteristic," or because it has been specifically listed as a hazardous waste by EPA. A contingent management approach would, upon compliance with certain regulatory requirements, exempt a waste from classification as hazardous regardless of whether the waste exhibits a characteristic or appears on the list. In contrast, EPA tends to use the label of "conditional exclusion" to apply to exemptions from classification as a listed waste. This approach is potentially more limited since it would not exempt characteristic hazardous wastes.

87 64 Fed. Reg. 45,632 (1999).

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who violated the conditional requirements becomes subject to the full Subtitle C requirements. Thus, EPA achieves regulation and enforcement without the stigmatizing effects of classification as hazardous waste. EPA has used or proposed the use of contingent management in a number of instances. These include:

Hazardous Waste Identification Rule. Perhaps EPA's most comprehensive proposed use of contingent management has been put forward in a series of Hazardous Waste Identification Rule (HWIR) proposals. These HWIR proposals attempt to deal with the problems of the mixture and derived-from rules by either excluding from hazardous waste classification or "contingently managing" certain low toxicity listed wastes. Under a 1999 HWIR proposal, EPA would exempt certain types of wastes that exhibit low levels of identified hazardous constituents if the wastes are disposed of in a landfill.⁸⁸ This idea is a continuation of EPA's 1995 HWIR proposal,⁸⁹ in which EPA proposed to establish three classes or tiers of wastes. Tier I wastes would be subject to full regulation as hazardous wastes if they contained concentrations of designated constituents above certain levels. Tier II wastes, containing levels of these constituents below the full regulatory level but above specified "exit" levels, would be excluded from regulation as hazardous waste if they were disposed of in certain regulated non-hazardous waste landfills. Tier III wastes, with constituent concentrations below defined "exit" levels, would be completely excluded from classification as hazardous waste. The Tier II intermediate wastes would be subject to a conditional exclusion, being classified as hazardous *unless* they are managed in a manner less comprehensive than full Subtitle C regulation.⁹⁰

Cement Kiln Dust. In August of 1999, EPA proposed a rule that would conditionally exempt cement kiln dust from classification as a hazardous waste if it complied with a series of technical requirements including land disposal location standards, air emission standards, and groundwater monitoring and corrective action requirements.⁹¹

Chlorinated Aliphatic Production Wastes. In August of 1999, EPA proposed

88 64 Fed. Reg. 63,382, 63,405 (1999). This is the "landfill-only" proposal. Alternatively, EPA has proposed a generic exemption that would exclude wastes containing low levels of hazardous constituents without imposing any federal contingent management requirements. *Id.* at 63,394.

89 See 60 Fed. Reg. 66,344 (1995).

90 In 1995, EPA also discussed a conditional exemption for certain types of petroleum refinery wastes. 60 Fed. Reg. 57,749 (1995). EPA considered listing these wastes as hazardous unless they were managed in a number of different ways that the Agency determines do not pose a significant environmental risk.

91 64 Fed. Reg. 45,632 (1999).

to list “conditionally” certain chlorinated aliphatic production wastes.⁹² Under this proposal, these wastes would not be listed as hazardous if they were managed in specified types of landfills.⁹³

Military Munitions. In 1997, EPA promulgated a rule regulating “waste military munitions” under RCRA.⁹⁴ As part of this regulation, EPA established a conditional exemption for storage of non-chemical military munitions waste. EPA stated that it does not believe that full regulation of these wastes is necessary when the munitions are handled in compliance with certain Department of Defense (DOD) requirements and with specific regulatory conditions established by EPA. Under the conditional exemption, these wastes are excluded from classification as hazardous if the DOD and EPA requirements are met.⁹⁵ The effect of this exemption is, among other things, to make the DOD and EPA requirements enforceable under RCRA.

B. *Issues in Implementation of a Contingent Management Approach*

1. Classification as a Hazardous Waste

The contingent management approach is limited; it can be used only for those wastes that otherwise would be classified as hazardous waste. A waste can be contingently exempt only if it has previously been classified as a hazardous waste either through exhibiting a hazard characteristic or by virtue of being listed. In the absence of a determination that a waste is hazardous, it is impossible to force a violator to comply with the contingent regulations. Thus, as a prerequisite to application of contingent management, EPA must either simultaneously list and contingently exempt the waste, or, for characteristic wastes, specifically exclude them from classification as hazardous wastes upon compliance with the contingent regulation. In other words, contingent management relies on the simultaneous assertion of jurisdiction over unregulated wastes and disavowal of jurisdiction over wastes that comply with the contingent requirements. This may have implications for EPA’s legal authority to exempt, contingently, wastes from regulation under Subtitle C.

92 64 Fed. Reg. 46,476 (1999).

93 This conditional exclusion would be included as part of the listing description contained in 40 C.F.R. § 261.32 (2000).

94 62 Fed. Reg. 6,622 (1997).

95 40 C.F.R. § 266.205 (2000).

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2. Establishment of Management Requirements

The key element of a contingent management approach is the imposition of enforceable regulatory requirements. The contingent management proposals discussed above generally contain detailed sets of management requirements that must be satisfied as a condition for exclusion.

In most cases, these management requirements reflect EPA's determination that certain conditions must be met in order to adequately protect human health and the environment. What they may not reflect is specific statutory requirements that Congress has established regarding the disposal of hazardous waste. In its proposed contingent management regulation of a chlorinated aliphatic waste, for example, EPA would exempt the waste from classification as a hazardous waste if it is disposed of in a landfill meeting Subtitle C or Subtitle D requirements.⁹⁶ Although a hazardous waste that is disposed of in a landfill must satisfy statutory land disposal restrictions,⁹⁷ these conditionally exempt wastes, when land disposed, would not. Perhaps more significantly, EPA, through contingent management, is permitting disposal of wastes in facilities that do not satisfy the extensive requirements, including minimum technology, financial assurance, and corrective action, that the statute imposes on TSDFs under Subtitle C.⁹⁸

Through the slight of hand of contingent management, wastes are exempt from classification as hazardous; thus, they evade the mandatory requirements that apply to hazardous waste.⁹⁹ EPA may be using contingent management to establish enforceable requirements that it could not justify under either Subtitle C or Subtitle D. In short, EPA has attempted to have two wrongs make a right.

3. Enforcement of Contingent Management Requirements

To EPA, the perceived advantage of the contingent management approach is that it allows federal enforcement of waste management

⁹⁶ 64 Fed. Reg. 46,476, 46,508 (1999). Other contingent management proposals may not raise the same land ban concerns. The HWIR proposal to exempt conditionally certain wastes managed in landfills applies to wastes that were previously classified as hazardous waste; it is a mechanism for removing them from their existing hazardous waste status. *Supra* notes 88-89. It is EPA's apparent position, explicit only for its proposed generic exemption, that if the materials were previously hazardous they would still need to meet land disposal restrictions. *See* 64 Fed. Reg. at 63,403. EPA's contingent management proposal for cement kiln dust is based on explicit statutory authority that allows the modification of land disposal restrictions. 42 U.S.C. § 6924 (2000).

⁹⁷ *Supra* note 59.

⁹⁸ *Supra* notes 60-63.

⁹⁹ This seems to be the implication of the court's reasoning in *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998). *See infra* notes 109-114.

requirements without classifying the waste as hazardous. Violation of the contingent management requirements results in the waste's losing its conditional exemption and becoming designated as hazardous. At that point, the violator is subject to civil and criminal liability under § 3008.¹⁰⁰

Although members of the regulated community may be happy to have their wastes excluded from the hazardous classification, they ought to contain their joy. If violation of a single element of a contingent management causes a material to be classified as a hazardous waste, the violator would potentially be liable for penalties, not from a single violation of the regulation, but for the full range of penalties for improper disposal of hazardous waste. In other words, contingent management is an all-or-nothing approach. Violation of any condition of exemption exposes the violator to the full range of penalties for non-permitted disposal of hazardous waste. This can be of tremendous significance under EPA's RCRA Penalty Policy.¹⁰¹

In apparent recognition of this all-or-nothing enforcement problem, EPA suggested a clever enforcement distinction in one of its contingent management proposals. In the 1999 HWIR proposal, EPA proposed a distinction between "conditions" and "requirements."¹⁰² Violation of a condition, according to EPA, would cause the waste to lose its conditional exemption and become a hazardous waste subject to full Subtitle C enforcement. In contrast, violation of a requirement might result in a penalty but not loss of the hazardous waste exclusion.¹⁰³

Requirements would include certain notification and tracking procedures that EPA claims are imposed under the authority of §§ 3007 and 2002 of RCRA. However, the legality of such requirements is questionable. Section 3007 gives EPA the authority to compel persons to provide information relating to hazardous waste. However, while § 3007 applies only to information about hazardous wastes, EPA is apparently using it to claim the authority to impose enforceable notice requirements on wastes that are specifically excluded from classification as hazardous. Further, § 2002 contains general rule-making authority but no specific authority for the procedures at issue. Thus, this strategy of establishing enforceable notice

100 In its 1999 HWIR proposal, for example, EPA stated that failure to comply with the conditions for exemption would render the waste subject to regulation under Subtitle C. The waste would be considered hazardous and subject to all provisions of RCRA Subtitle C. 64 Fed. Reg. at 64,407.

101 See RCRA Civil Penalty Policy, OESWER Directive 9900.1A (1990). Under its RCRA Penalty Policy, EPA's calculation of penalties includes, among other things, an assessment of the number, duration and gravity of the violations. See also 60 Fed. Reg. 66,706 (1995) (setting forth "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations").

102 64 Fed. Reg. at 64,406.

103 In this context, EPA defines a requirement as an obligation whose violation would not affect the exempt status of the HWIR waste, but would be a violation of RCRA. *Id.*

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requirements on non-hazardous waste is of questionable legality.¹⁰⁴

Even under EPA's rationale, however, the use of requirements, as opposed to conditions, to minimize the all-or-nothing enforcement consequences of contingent management would be limited to information gathering restrictions potentially justified under §§ 3007 or 2002 .

4. Regulatory Coherence

One might hope that implementation of a contingent management approach would reflect a consistent and rational scheme that clarifies the waste management requirements for the regulated community. While RCRA regulations are not noted for their clarity of organization or drafting, the contingent management approach is particularly piecemeal and incoherent.

Many, but not all, of EPA's contingent management requirements are included as parts of a subsection in Part 261 that governs exclusions from classification as hazardous waste. Most provisions of this subsection identify wastes that are unconditionally excluded from classification as hazardous waste, but EPA is now complicating this subsection with detailed management requirements for those wastes that it conditionally exempts.

EPA, however, is not consistent even in this approach. The contingent management requirements that apply to military munitions, for example, are included as a subpart to 40 C.F.R. Part 266 (1990) that otherwise deals with requirements for recyclable materials. In contrast, EPA's proposal to institute contingent management standards for cement kiln dust would establish a new Part 259 limited solely to cement kiln dust requirements. Further, EPA's contingent management requirements for chlorinated aliphatics would be included as part of the listing description.¹⁰⁵ EPA has not articulated a rationale for use of these differing approaches, and it is likely that this reflects EPA's own uncertainty as to the legal basis for employing contingent management.

IV. The Legality of Contingent Management

A. *EPA's Legal Rationale for Contingent Management*

EPA has articulated its legal rationale for the contingent management

¹⁰⁴ Enforceable information disclosure requirements also may raise separate issues under the Paperwork Reduction Act. 44 U.S.C. §§ 3501-3520 (1994). This statute, among other things, authorizes the Office of Management and Budget to approve or disapprove agency proposals for information collection.

¹⁰⁵ See *supra* notes 92-93.

approach in a number of recent rule-makings.¹⁰⁶ The basic premise of conditional regulation is that EPA need not list a waste as hazardous, even if it is inherently toxic, if there is no “need” for regulation.¹⁰⁷ Relying on the statutory language of §§1004(5) and 3001 and the listing criteria in 40 C.F.R. § 261.11, EPA has concluded that it may determine not to list a waste if mismanagement is implausible or if the waste is otherwise adequately regulated.¹⁰⁸ This statement itself is an unremarkable restatement of the statutory and regulatory listing criteria.

The remarkable extension of this rationale is EPA’s claim that it may therefore adopt a set of regulations under RCRA that themselves remove the risk of plausible mismanagement. It is one thing to say that a waste will not be listed as a hazardous waste because existing data do not show a threat of mismanagement or that regulations legally adopted under other regulatory schemes minimize the threat of mismanagement. It is quite another to claim legal authority, not otherwise available to regulate a non-hazardous waste, to create the very conditions that justify a decision not to regulate a waste as hazardous in the first place. It is even more remarkable to claim authority to avoid legal requirements, such as “land disposal restrictions,” which would otherwise apply if the waste were classified as hazardous.

Indeed, there is a quality of optical illusion about EPA’s approach; it is both appealing and disturbing. Viewed from one perspective, it is simply an attempt to define those conditions under which wastes will satisfy the criteria for classification as a hazardous waste. Viewed from another perspective, it

106 See, e.g., 64 Fed. Reg. 63,382 (1999) (proposed Hazardous Waste Identification Rule); 64 Fed. Reg. 46,476 (1999) (proposed conditional listing of certain chlorinated aliphatic wastes); 64 Fed. Reg. 45,632, 45,641 (1999) (proposed conditional exemption for cement kiln dust, citing rationale in 1997 Military Munitions Rule preamble); 64 Fed. Reg. 10,064 (1999) (advanced notice of proposed rule-making for storage of mixed low-level radioactive waste); 62 Fed. Reg. 6622 (1997) (Military Munitions Rule).

107 Although EPA asserts this general rationale in justifying contingent management, there are other explanations that may apply to specific regulatory decisions. In 1997, for example, EPA promulgated a conditional exemption for shredded circuit boards generated by the electronics industry. 62 Fed. Reg. 25,998 (1997). This conditional exemption excluded the material from classification as a solid waste in addition to its exclusion as a hazardous waste. Consequently, EPA justified this exemption by way of its criteria for granting a variance for classification of a material as a solid waste, rather than relying on the general hazardous waste rationale. 40 C.F.R. § 261.30-.31 (2000).

In addition to the general rationale, EPA could also make a lesser-included-authority argument. In other words, EPA’s authority to regulate a waste as hazardous includes the authority to establish lesser regulations. In its 1999 HWIR proposal, EPA proposed the option of excluding otherwise hazardous wastes from hazardous waste classification if they either 1) contain constituents below exclusion levels or 2) contain constituents below exclusion levels and are managed in appropriate landfills. See *supra* notes 88-89. Presumably, EPA could claim that if it has the authority either to regulate fully or exclude from regulation, it must have the authority to take an intermediate step of exclusion with contingent regulation. However, the decision to classify a material as a hazardous waste is an either-or proposition. Through contingent management, EPA is claiming authority to impose restrictions that it could not impose if the waste were either classified as hazardous or excluded from classification.

108 See *infra* notes 115-139 for an analysis of the legality of this position.

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is EPA's imposition of an entire regulatory program on materials without either invoking the statutory requirement for classification as a hazardous waste or complying with mandatory statutory consequences that flow from that classification.

B. *Evaluation of Contingent Management in Military Toxics Project v. EPA*

EPA has stated that the legality of contingent management was upheld in *Military Toxics Project v. EPA*.¹⁰⁹ In fact, *Military Toxics Project* failed to address the significant legal concerns raised by contingent management. The case involved, among other things, a challenge to EPA's decision to conditionally exempt certain waste munitions from classification as hazardous waste. Under the challenged regulation, the wastes would be exempt if they were managed in compliance with existing Department of Defense (DOD) and Department of Transportation (DOT) requirements and the relevant party had met certain EPA established inventory and notice requirements. Petitioners claimed that the conditional exemption was not authorized by RCRA and that the conditional regulations were "not as protective as the Subtitle C regulatory scheme."¹¹⁰

Although the court upheld the concept of conditional exemption, it did so in a way that avoided the most significant issues. First, the court only addressed the issue of whether EPA could conditionally exempt a waste based on compliance with DOD and DOT regulations validly adopted under other regulatory authority.¹¹¹ The court, in fact, characterized the conditions directly imposed by EPA as "other criteria not relevant here."¹¹²

Second, under the court's approach to evaluating contingent management, the only relevant issue was whether EPA could exclude military munitions from classification as a hazardous waste. The court claimed that the "flaw" in petitioner's argument for the application of Subtitle C requirements was that those requirements applied only to hazardous waste. Since the conditional exemption removed the waste from classification as a hazardous waste, EPA had no obligation to promulgate

109 146 F.3d 948 (D.C. Cir. 1998). The EPA contends that the D.C. Circuit Court of Appeals expressly upheld EPA's authority under RCRA to establish a conditional exemption from Subtitle C regulation for wastes that would be hazardous, absent the exemption. 64 Fed. Reg. 45,632, 45,641 (1999).

110 146 F.3d at 957.

111 The court summarized EPA's rationale for contingent management. Because a hazardous waste is by definition a substance that poses "a substantial threat to human health and the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, the EPA concludes that where a waste might pose a hazard only under limited management scenarios, and *other regulatory programs* already address such scenarios, EPA is not required to classify a waste as hazardous waste subject to regulation under Subtitle C." *Id.* (emphasis added) (citations and internal quotations omitted).

112 *Id.* at 948.

regulations. According to the court, the petitioner “thus accuses EPA of failing to fulfill an obligation that simply is not there—assuming, that is, the agency has the authority conditionally to exempt the munitions from classification as hazardous waste.”¹¹³

At that point the court simply analyzed EPA’s decision to exempt the waste from classification as hazardous, not EPA’s authority or ability to impose enforceable conditions as a prerequisite to an exemption. Relying on the statutory language, the court held that EPA could legitimately make a decision not to regulate a waste under Subtitle C based on its assessment of whether such regulation was necessary.¹¹⁴ The court also concluded that it was not arbitrary and capricious for EPA to conclude that compliance with the military regulations would adequately protect human health and the environment.

If contingent management were limited to compliance with regulations that have been legally adopted under the authority of other statutes, it would be an interesting but minor aspect of RCRA. However, what EPA is in fact claiming as contingent management is far broader. EPA, among other things, is asserting the authority to establish its own enforceable requirements under Subtitle C of RCRA while avoiding the classification as hazardous waste that is a prerequisite to regulation under that subtitle. The court in *Military Toxics Project* simply did not address the legality of EPA’s conditioning the exclusion on compliance with other regulations and EPA’s own requirements. And it certainly did not address the issue of whether, through contingent exemptions, EPA can avoid RCRA requirements, such as the land disposal restrictions, that would otherwise apply to hazardous waste.

C. *Legal Concerns with Contingent Management*

EPA’s use of contingent management raises several significant legal issues that have not yet been addressed by the courts.

1. Contingent Management May Be Based on an Improper Application of Statutory and Regulatory Hazardous Waste Listing Criteria

Both EPA’s stated rationale and the holding in *Military Toxics Project* suggest that contingent management is simply an application of statutory and

¹¹³ *Id.* at 957.

¹¹⁴ The court recognized that this case did not involve an application of the listing criteria at 261.11. However, it did say that the rationale of those criteria—and the application of those criteria in *Natural Res. Def. Council v. EPA*, 25 F.3d 1063 (D.C. Cir. 1994)—justified a decision based on EPA’s assessment of the need for regulation. 146 F.3d at 958.

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regulatory criteria that establish evidence of “mismanagement” as a condition for designating a waste as hazardous. Neither the statute nor EPA’s listing criteria, however, directly support EPA’s authority to exclude wastes from classification as hazardous based upon compliance with conditions created as part of the RCRA process itself.

First, the sections of RCRA on which EPA relies do not support the use of contingent management. Section 1004(5)(B) defines a “hazardous waste” as solid waste which may present a substantial present or potential hazard to human health or the environment “when improperly . . . managed.”¹¹⁵ EPA has stated that it “reads this provision to allow it to determine the circumstances under which a waste may present a hazard and to regulate only when those conditions occur.”¹¹⁶ EPA also claims to find support in § 3001 based on language that allows EPA to develop criteria for hazardous wastes which should be subject to Subtitle C. It is, of course, possible to construe these sections to require EPA to justify classifying a material as a hazardous waste upon a showing that a significant human health or environmental risk would arise if the material were mismanaged. Nothing in the statutory language or legislative history cited by EPA, however, suggests that EPA can establish regulations outside the requirements of Subtitle C to prevent those conditions from arising.

Second, EPA has claimed support for its use of contingent management as an application of the listing criteria that EPA has promulgated at 40 C.F.R. § 261.11.¹¹⁷ There are, however, significant problems with reliance on EPA’s listing criteria as a justification for contingent management. EPA has never claimed that these criteria are an appropriate basis for exempting a “characteristic” waste from classification as a hazardous waste. It is quite an extension of EPA’s existing regulations to say that EPA can exclude a waste that exhibits a hazard characteristic because EPA had the discretion not to list the waste. Thus, to the extent that EPA is employing the contingent management technique to exempt characteristic wastes it may be improperly relying on the listing criteria.

Perhaps more significantly, the relevant regulatory listing factors,

115 42 U.S.C. § 6903(5). Unlike EPA’s listing criterion discussed below, § 1004(5) does not refer to plausible mismanagement. It simply requires a showing of harm in the event of mismanagement. *Id.*

116 60 Fed. Reg. 57,747, 57,777 (1995). EPA claims this position is supported by the language of § 1004(5)(A) which, according to EPA and in contrast to § 1004(5)(B), defines certain wastes as hazardous based on their “inherent” danger without regard to mismanagement. Additionally, EPA claims that the legislative history supports this position, citing to a House Report which states that “the basic thrust of this hazardous waste title is to identify what wastes are hazardous in what quantities, qualities and concentration, and the methods of disposal which may make such wastes hazardous.” 60 Fed. Reg. at 57,777 (citing H.R. Rep. No. 94 (1976)).

117 See *supra* notes 26-35 and accompanying text for a discussion of these criteria.

consideration of “plausible mismanagement” and “other existing regulations,” do not justify the imposition of conditions as a basis for exclusion. Under 40 C.F.R. § 261.11(a)(3), EPA’s listing decision is based, in part, on the “plausible types of improper management to which the waste could be subjected.”¹¹⁸ Pursuant to this factor, a decision to list a waste hinges not only on the inherent toxicity of the waste but also on the possibility of past or future mismanagement. At a minimum, the existence of this factor requires EPA to document its evaluation of “plausible mismanagement,” and recent decisions have established a rather stringent requirement on EPA to document examples of past mismanagement.¹¹⁹ Indeed, the courts seem to have placed an affirmative burden on EPA to justify the possibility of mismanagement as a requirement for listing.¹²⁰

118 40 C.F.R. § 261.11(a)(3)(vii) (2000). In the preamble to its 1980 regulations, EPA stated: It is EPA’s conviction that most wastes are hazardous only because they pose a substantial present or potential hazard to human health or the environment *when improperly managed* and thus meet part [B] of the statutory definition of hazardous waste. Nevertheless, EPA recognizes that there are wastes which are so acutely hazardous that they can be considered to present a substantial hazard whether improperly managed or not.

45 Fed. Reg. 33,084, 33,106 (1980) (emphasis in original) (internal quotations omitted). Thus, the plausible mismanagement criterion arises from EPA’s “conviction.” Certainly, nothing in the statutory definition directly limits classification of hazardous wastes only to those where EPA shows that there is the possibility of “plausible” mismanagement. The statute merely identifies hazardous wastes as those that pose a threat to human health or the environment *when mismanaged*. No case, however, has addressed whether the criterion of plausible mismanagement is proper under RCRA.

119 See, e.g., *Edison Elec. Instit. v. EPA*, 2 F.3d 438 (D.C. Cir. 1993); *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394 (D.C. Cir. 1996). Cf. *Env’tl. Def. Fund v. EPA*, 210 F.3d 396 (D.C. Cir. 2000) (holding that EPA may assess distinct solvents rather than combinations in assessing plausible mismanagement scenarios). In *Dithiocarbamate Task Force v. EPA*, for example, the D.C. Circuit invalidated EPA’s listing of a number of hazardous wastes in part based on the court’s conclusion that EPA had failed to address the issue of plausible mismanagement. 98 F.3d 1394. If this opinion simply held that EPA must consider all of the factors enumerated in subsection (a)(3), see *supra* note 31, it would be unremarkable. The opinion, however, implies more. First, the court noted that the “improper management” factor (vii) is not only mentioned in other enumerated factors (namely, (iii) and (ix)), but also is an “echo” of the statutory definition of hazardous waste. 98 F.3d at 1897-99. Thus, although the court claimed deference to EPA’s weighting of the factors, it seems to elevate the status of possible mismanagement in the listing decision. *Id.* The court was certainly explicit that EPA cannot justify a listing decision based solely on the inherent toxicity of the wastes. *Id.* at 1399. Further, the court was particularly willing to reject EPA’s asserted claims of plausible mismanagement and seemed to place a substantial burden of proof on the agency to justify its claims. *Id.*

120 See, e.g., *id.* Although not discussed by the court, EPA may have created this situation by a 1990 amendment to the listing criteria. When originally promulgated in 1980, the regulation provided that a waste could be listed if the waste contained an Appendix VIII constituent unless EPA determined it was not capable of posing a substantial hazard. See 45 Fed. Reg. 33,121 (1980). In 1990, EPA amended the regulations to their current form which authorizes listing if the waste contains an Appendix VIII constituent and EPA affirmatively determines that it poses a hazard. See 55 Fed. Reg. 18,726 (1990). This change appears to have reversed the presumption of listing. Under the 1980 version any waste which contained an Appendix VIII constituent could be listed unless EPA determined it was *not* capable of posing a threat. 45 Fed. Reg. at 33,121. Under the 1990 amendments, a waste could be listed if it contained an Appendix VIII constituent and EPA affirmatively determined that it is capable of causing a threat. See 55 Fed. Reg. at 18,726.

EPA made this change without going through notice and comment procedures based on its claim

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Although case law suggests that EPA not only may, but must, assess the possible mismanagement of wastes in applying its listing criteria, the existing cases primarily focus on technical and historical factors relating to the mismanagement of wastes. Nothing in these cases or the listing criterion implies that the possibility of “plausible mismanagement” is to be assessed in light of contingent regulation.¹²¹

Another of the enumerated listing factors in subsection (a)(3) is “[a]ction taken by other governmental agencies or regulatory programs based on the health or environmental hazard posed by the waste or waste constituent.”¹²² This factor presumably gives EPA the discretion to consider the impact of other government regulations on the need to list a waste.¹²³ In *Natural Resources Defense Counsel v. EPA*,¹²⁴ the court upheld EPA’s decision not to list used oil based, in part, on the existence of regulations promulgated by other federal agencies that affected the management of used oil.¹²⁵ This factor focuses on the need to list a waste as hazardous in light of the existence of programs established under the authority of other regulatory agencies; this factor certainly does not imply that EPA can use the factor itself as a basis for authority to contingently regulate a waste.

that it was a “technical correction” that did not affect EPA listing practices. Following legal challenge, EPA withdrew the amendment but readopted it after notice and comment. See 56 Fed. Reg. 33,238 (1991); *Env’tl. Def. Fund. v. Reilly*, 1 F.3d 1254 (D.C. Cir. 1993). EPA continued to claim, however, that the change did not affect listing practices. *Id.*

It is somewhat strange for EPA to claim that its original regulation placed the burden on EPA to affirmatively document plausible mismanagement as a condition for listing. In the preamble to its original 1980 regulations, EPA justified its listing criteria with a reference to a Senate bill that was a predecessor to RCRA. EPA stated that “[t]he Senate bill, like RCRA’s final regulations envisioned a presumption in favor of listing based on the presence of a toxic constituent in the waste which is rebuttable by a consideration of other factors.” 45 Fed. Reg. at 33,107.

121 Indeed, EPA’s separate consideration under § 261.11(a)(3) of other existing regulations might be taken to imply that the assessment of plausible mismanagement does not include the impact of regulatory requirements.

122 40 C.F.R. § 261.11(a)(3)(x) (1980).

123 It is therefore closely related to EPA’s assessment of plausible mismanagement scenarios. See *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394 (D.C. Cir. 1996).

124 25 F.3d 1063, 1065 (D.C. Cir. 1994).

125 The court also allowed EPA to rely on the fact that some portion of used oil would be regulated as hazardous waste since it would exhibit the toxicity characteristic. The court declined to accept what it considered an apparent attack on the adequacy of the toxicity characteristic. *Id.* at 1068-69. The court also rejected the argument that EPA could rely on other regulatory programs only if they were as “comprehensive” as regulation under Subtitle C of RCRA. *Id.* at 1022. Since, the court reasoned, almost any other program is less comprehensive than RCRA, acceptance of this argument would mean that EPA could never rely on other programs in making listing decisions. *Id.* The majority declined to consider whether EPA could legitimately assume compliance with those other regulatory requirements when addressing the listing factors relating to “improper” management. *Id.* at 1071. The majority concluded that the issue had not been properly raised at an earlier stage in the proceeding. *Id.* Judge Wald, in dissent, thought the issue had been properly raised and found that EPA had not justified its apparent conclusion that the existing regulatory framework would ensure that improper management would not occur. *Id.* at 1078 (Wald, J., dissenting).

2. Contingent Management Improperly Relies on Factors that EPA May Not Consider Under RCRA

Both explicitly and implicitly, the purpose of contingent management is to exempt certain materials from both the stigma and cost of hazardous waste regulation.¹²⁶ Indeed, those *must* be the basic objectives of contingent management. Since classification of a waste as hazardous is a prerequisite to its use, the only advantages of contingent management are the ability to avoid the stigma of classification and the cost of applying mandatory statutory provisions, such as the land ban. There is substantial doubt whether either stigma or cost can legitimately be considered by EPA as part of a decision to list a waste as hazardous.

a. Stigma

Concerns with stigma stem from the possibility that recycling or other proper management practices might actually be discouraged if a waste is listed as hazardous. Recognizing this possibility, EPA regulations specify, for example, that recycled hazardous wastes are to be called “recyclable materials” rather than “recycled hazardous waste.”¹²⁷ EPA applies this term “to avoid conceivable stigmatization.”¹²⁸ This regulation, however, applies to materials that have otherwise been classified as hazardous waste.

EPA’s attempt to use stigma as a rationale for not listing a waste as hazardous has been specifically rejected in court. In *Hazardous Waste Treatment Council v. EPA*,¹²⁹ the court reviewed a challenge to EPA’s decision not to list used oil as a hazardous waste. EPA justified its decision,

126 EPA does not generally acknowledge reliance on stigma as a basis for the use of contingent management. Comments from industry do, however, raise this concern. Several comments on EPA’s recent contingent management proposal for cement kiln dust raised concerns with the stigma associated with hazardous waste classification. *See, e.g.*, 64 Fed. Reg. 45,632, 45,634, 45,641 (1999).

EPA has been somewhat more forthcoming about its reliance on cost as a basis for contingent management. EPA justified its proposed contingent management regulation of cement kiln dust, in part, because full Subtitle C regulation would be “prohibitively expensive” and would impose “unnecessary compliance costs.” *See* 64 Fed. Reg. 45,632, 45,641 (1999). In its 1999 proposed contingent management regulation of a chlorinated aliphatics production waste, EPA apparently used cost as a partial basis to justify its decision to impose reduced requirements through contingent management, stating, “EPA believes that an opportunity exists to establish a conditional management listing for these sludges that will reduce the risks associated with unsafe management practices, while not imposing significant incremental costs upon generators managing the wastes in a manner that does not pose significant risk.” 64 Fed. Reg. 46,476, 46,508 (1999).

127 40 C.F.R. § 261.6(a)(1) (2000).

128 50 Fed. Reg. 646 (1985). Although EPA regulations provide that the label of “recyclable materials” is to be used, this is a “custom more honored in the breach than the observance.” *Id.* As discussed *infra*, development and consistent use of separate labels for different subclasses of hazardous waste might actually minimize some concerns relating to stigma.

129 861 F.2d 270 (D.C. Cir. 1988).

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in part, on the unwanted effects of the stigma of hazardous waste listing. The D.C. Circuit rejected this rationale and held that EPA could not consider stigma in making listing decisions. The court noted that RCRA and EPA's implementing regulations refer only to technical characteristics of hazardous waste and do not mention stigma.¹³⁰ The court acknowledged that EPA's concerns with the effects of listing might be warranted, but stated that "[n]evertheless, it is the Agency's obligation to comply with the dictates of Congress, and ours to enforce them."¹³¹ The court provided little analysis of why the statute itself precluded consideration of stigma. Because its decision relied on the absence of stigma under EPA's listing criteria, the court did not speak to whether EPA could consider the effects of stigma if its own listing criteria were modified. In light of *Hazardous Waste Treatment Council*, and in the absence of an amendment to its listing criteria, EPA seems to be precluded from using stigma concerns as a basis for a listing and, therefore, contingent management decisions.¹³²

b. Cost

Another possible justification for contingent management is to avoid costs associated with full regulation of a waste as hazardous. Nothing in the statute or EPA regulations, however, expressly authorizes consideration of cost factors in making a hazardous waste classification.¹³³ The definition of

¹³⁰ The court rejected an argument that specific provisions of RCRA addressing the recycling of used oil allowed EPA to consider the stigmatizing effects of listing. *Hazardous Waste Treatment Council*, 861 F.2d at 275.

¹³¹ *Id.* at 277.

¹³² EPA has not, however, totally forgone references to stigma in its listing decisions. In a recent decision not to classify fossil fuel wastes as hazardous, EPA stated:

Normally, concerns about stigma are not a deciding factor in EPA's decisions under RCRA, given the central concern under the statute for protection of human health and the environment. However, given our conclusion that the subtitle D approach here should be fully effective in protecting human health and the environment, and given the large and salutary role that beneficial reuse plays for this waste, concern over stigma is a factor supporting our decision today that subtitle C regulation is unwarranted in light of our decision to pursue a subtitle D approach.

65 Fed. Reg. 32,214, 32,217 (2000) (to be codified at 40 C.F.R. pt. 261).

¹³³ In its 1994 Hazardous Waste Listing Determination Policy, EPA identified cost as relevant under the (a)(3) factors only for determining whether a mismanagement scenario is plausible. EPA wrote:

In the absence of other potential cost factors, such as liability, the plausibility that a facility would choose a waste management scenario increases as the expense of that management practice decreases. Conversely, it is more implausible to assume that a firm would choose management activities that impose a higher cost (where cost includes the likelihood of future potential liabilities). Cost can be a consideration that the Agency uses in choosing which management scenario to project as a scenario to analyze for determining potential risk of waste management.

59 Fed. Reg. 66,072, 66,074 (1994). Obviously, this is not a claim that EPA can decline to list a waste based on the resultant costs.

“hazardous waste” in § 1004(5) identifies factors relating to the inherent toxicity of a waste but allows, in its closest approach to cost concerns, classification of those wastes that pose a “substantial” risk if “improperly” managed. EPA’s regulatory factors in 261.11(a)(3) do not expressly allow cost considerations. Under the logic of *Hazardous Waste Treatment Council*, the absence of cost considerations in these factors would preclude their use.

But there may be stronger reasons for concluding that cost is not appropriately considered as part of a listing decision. The absence of a specified cost factor (unlike the absence of a stigma factor) reflects the structure of Subtitle C of RCRA. Hazardous waste classification is a function of the environmental threat posed by a waste. Considerations of inherent toxicity, plausible mismanagement, and alternative regulatory controls all serve to define the basic listing standard of substantial risk to human health and the environment. EPA is not authorized, explicitly at least, to decline to regulate a waste as hazardous because it judges the cost to be too great.¹³⁴ EPA itself has disclaimed the authority to use cost in establishing Subtitle C regulations.¹³⁵ To the extent that EPA is using cost considerations as a basis for imposing reduced requirements through contingent management, it may again be circumventing otherwise applicable RCRA requirements.

3. Contingent Management Allows Avoidance of Otherwise Applicable Statutory Requirements

As noted, classification as a hazardous waste results in a number of management requirements. EPA may have the discretion to waive some in the context of Subtitle C Minus regulations, but other requirements are statutory minimums.¹³⁶ Although Congress provided an express waiver of these requirements for certain mining industry wastes that EPA proposes to regulate through contingent management,¹³⁷ no such statutory waiver applies to other types of wastes. To the extent that EPA is avoiding application of these requirements for contingently exempt non-mining wastes, it is avoiding the specific requirements of the statute.

It seems an extraordinary stretch of EPA’s statutory authority to claim that Congress intended to give EPA, through contingent management, the discretion to avoid otherwise applicable requirements. This is particularly

¹³⁴ This is not to say that EPA might not attempt to justify a listing decision on grounds of cost. EPA justified a decision not to list certain mining wastes as hazardous based in part on its conclusion that application of Subtitle C requirements was “technically infeasible, or economically impractical.” 51 Fed. Reg. 24,496 (1986). EPA, however, apparently claimed that special provisions applicable to mining wastes specifically authorized consideration of cost. *Id.* See 42 U.S.C. §§ 6921(a), 6981(f)(5) (2000).

¹³⁵ See *supra* note 64.

¹³⁶ See *supra* notes 59-62 and accompanying text.

¹³⁷ See 42 U.S.C. § 6924 (2000).

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true in light of the history of the mandatory provisions of RCRA. When initially adopted in 1976, RCRA generally conferred authority upon EPA to adopt regulations “necessary to protect human health and the environment.”¹³⁸ In the Hazardous and Solid Waste Amendments (HSWA) of 1984, however, Congress amended RCRA to establish mandatory minimum requirements and limit EPA’s discretion. The mandatory HSWA provisions were specifically adopted to restrict EPA’s discretion in response to widespread concerns about EPA’s implementation of RCRA under the Reagan administration.¹³⁹ This history establishes that EPA has no discretion to avoid the mandatory requirements under the guise of contingent management.

4. Application of Contingent Management is Boundless

The logic behind contingent management makes its application essentially boundless. To the extent that EPA claims that it can eliminate the risk of mismanagement through contingent management, application of the concept is not limited to “not very hazardous” wastes. Indeed, it would appear any waste could be exempted from regulation as a hazardous waste. EPA need merely create conditions for exemption that control the risk of mismanagement, and the need for regulation under Subtitle C is avoided. RCRA is reduced to a scheme for classification of wastes as hazardous and an enforceable prohibition against disposal of hazardous waste. All other management requirements are developed at EPA’s discretion through promulgation of conditions for contingent management.

V. Contingent Management as an Exercise of Agency Discretion

EPA’s adoption of contingent management regulations can be seen as a straightforward issue of EPA’s interpretation of the statutory and regulatory criteria for classification of hazardous wastes; on its face, EPA is simply defining the statutory and regulatory predicate of “mismanagement.”¹⁴⁰ Thus

138 See RICHARD C. FORTUNA & DAVID J. LENNETT, HAZARDOUS WASTE REGULATION: THE NEW ERA 10 (1987) (stating that prior to the HSWA amendments, RCRA “provid[ed] EPA with wide latitude in designing the particulars of the regulatory program”); Erik H. Corwin, Note, *Congressional Limits on Agency Discretion: A Case Study of the Hazardous and Solid Waste Amendments of 1984*, 29 HARV. J. ON LEGIS. 517, 529 (1992).

139 James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980’s*, 3 YALE J. ON REG. 351, 376 (1986). See, e.g., Corwin, *supra* note 138, at 525.

140 Agencies commonly define terms and, implicitly or explicitly, establish the criteria for satisfying a definitional term. Furthermore, agency attempts to impose or waive requirements outside the scope of statutes are hardly unknown. Through the exercise of enforcement discretion, for example, EPA has attempted to use explicit exercises of enforcement discretion to allow polluters greater time than authorized by statute to come into compliance. In the 1970’s, EPA issued enforcement compliance

phrased, the issue of the legality of contingent management may hinge on the extent of judicial deference to EPA's interpretation of RCRA and its implementing regulations.

This issue leads, as all administrative law roads must, to *Chevron USA, Inc. v. Natural Resource Defense Council, Inc.*,¹⁴¹ the Supreme Court's contemporary statement of the role of courts in review of agency interpretation. Under the familiar *Chevron* two step analysis, courts are instructed to defer to an agency interpretation unless, first, Congress has directly spoken to the precise issue, or second, the Agency's construction does not fall within some reasonable range of interpretations of the statute.¹⁴² A concept of judicial deference to agency action is not new.¹⁴³ What *Chevron* added was a distinct rationale for such deference. In addition to the more traditional recognition of agency expertise and competence, the *Chevron* court added the remarkable premise that statutory ambiguities imply a delegation of authority to the more politically accountable executive agencies, rather than the courts, to resolve such ambiguity.¹⁴⁴

schedule letters, stating that it would not bring enforcement actions for failure to achieve compliance by the statutory deadline if the discharger made good faith efforts to comply. See Norton J. Tennile, Jr., *Federal Water Pollution Control Act Enforcement From the Discharger's Perspective: The Uses and Abuses of Discretion*, 7 ENV'T. L.REP. 50,091 (1977). Through negotiated consent decrees, EPA has privately negotiated regulatory requirements in the context of resolution of litigation. See Jeffrey M. Gaba, *Informal Rule-making by Settlement Agreement*, 73 GEO. L.J. 1241 (1985). This process has also been discussed with respect to procedures at other agencies. See Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987); Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241. Through licensing decisions, some agencies have attempted to "jawbone" industry into accepting obligations that the agencies might not have had the legal or political power to impose through rule-making. See, e.g., *Writers Guild of Am. v. Am. Broad. Co.*, 609 F.2d 355, 359-66 (9th Cir. 1979) (describing "jawboning" by FCC to attempt to force broadcasters to "voluntarily" limit depictions of sex and violence).

Commentators have identified concerns with agency imposition of conditions in this manner. See, e.g., Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873. Thus improper exercises of agency authority through jawboning hardly justify the improper exercise of authority through contingent management. The use of contingent management as a comprehensive regulatory technique raises questions beyond those raised by case-by-case "jawboning" or exercises of enforcement discretion. Contingent management uses the rule-making process formally to bind the agency to positions on the application of a statute, and EPA asserts a specific statutory basis for its position. This is not a case of interstitial manipulation of a statute by an agency. Under the rationale advanced by EPA, contingent management is a comprehensive basis for regulation.

141 467 U.S. 837 (1984). Administrative law scholars contend that *Chevron* may qualify as the most influential case in American public law, measured in sheer number of citations. See, e.g., STEVEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 256 (4th ed. 1999).

142 467 U.S. 837 (1984). See generally Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).

143 See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (regarding deference in the context of agency rule-making); *NLRB v. Hearst*, 322 U.S. 111 (1944) (regarding deference in the context of agency adjudication).

144 *Chevron*, 467 U.S. at 865. The Supreme Court, in *FDA v. Brown & Williamson*, 529 U.S. 120, 120 S.Ct. 1291, 1314 (2000), stated, "deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit

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Whatever one can say about the conceptual basis of *Chevron*—and almost everyone has said something—the two step approach is clearer in statement than in application. Although a strict application of *Chevron* might suggest that an agency interpretation should win if at all plausible, that has not been the experience in applying *Chevron*.¹⁴⁵ Whether under the guise of a Step One or Step Two analysis, courts have been remarkably willing to engage in rather traditional forms of statutory interpretation to evaluate the legitimacy of an agency's interpretation.¹⁴⁶

Both opponents and supporters of contingent management can fashion plausible arguments that *Chevron* supports their position. On the one hand, opponents can argue that, viewing the provisions of RCRA as a whole, Congress did not intend to authorize a mechanism that, first, circumvents statutorily prescribed consequences of hazardous waste classifications, second, has the potential to displace the entire regulatory scheme created by Congress in Subtitle C, and, third, authorizes the imposition of conditions on a class of non-hazardous solid waste not otherwise authorized by the statute. This is plausible as a Step One argument that Congress clearly did not intend such an interpretation or as a Step Two argument that EPA's interpretation is not within some range of plausible constructions of the statute. On the other hand, supporters can claim that it is reasonable to conclude that by a statutory emphasis on mismanagement, Congress authorized EPA to limit the requirements under Subtitle C to those materials that, in the absence of direct

delegation from Congress to the agency to fill in the statutory gaps."

In *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991), the Court noted:

Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches. As *Chevron* itself illustrates, the resolution of ambiguity in a statutory text is often more a question of policy than of law. When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.

Id. at 696-97 (citations omitted). See generally David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (2000); Pierce, *supra* note 142; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

145 The Supreme Court itself has honored *Chevron* as much in the breach as in the observance and has been far from consistent in its views on deference to agency interpretations. See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994). As noted by Gellhorn and Verkuil, "the United States Supreme Court cases have limited the application of *Chevron* more often than they have applied it and the cases often are difficult to reconcile." Ernest Gellhorn and Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 993 (1999).

146 *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), is a recent example of the ambiguity of finding ambiguity. The Court, in a 5 to 4 vote, held that Congress had unambiguously spoken to the question of whether FDA could assert jurisdiction over tobacco products. The majority's conclusion that Congress unambiguously intended to preclude such jurisdiction involved a wide-ranging review of the Food Drug and Cosmetic Act and other actions by Congress over 35 years. It is hard to know what to make of the strength of *Chevron* deference when Congress can be found to have "clearly spoken" to an issue despite the fact that four of nine members of the Court found the issue ambiguous.

Subtitle C control, pose risks to human health and the environment. Contingent management, according to EPA, would satisfy this congressional objective.

Thus, the legality of EPA's position on contingent management cannot be resolved by a pro forma claim of deference under *Chevron*.¹⁴⁷ Perhaps the better question is whether the underlying logic of *Chevron* warrants deference to EPA's position. In other words, is there something inherent in the concept of contingent management that can inform the issue of proper judicial role in reviewing EPA's interpretation?

Commentators have noted a number of distinctive factors that may affect the propriety of deference under *Chevron*.¹⁴⁸ One particular concern is the extent to which *Chevron* deference applies to an agency's interpretation of its own jurisdictional scope.¹⁴⁹ This has been articulated in a variety of ways, ranging from concerns about agency aggrandizement and self-interest, to traditional common law restraints on an entity's judging the scope of its own jurisdiction, to problems arising when agencies enter areas beyond the scope of their expertise.¹⁵⁰ Whatever the rationale, courts have evidenced some concern with agencies' assertions of jurisdiction through expansive statutory interpretations,¹⁵¹ and, although unresolved by the case law, *Chevron* deference remains somewhat problematic in the context of the interpretation of agency jurisdiction.¹⁵²

147 The court in *Military Toxics Project* expressly relied on *Chevron* as a basis for upholding EPA's interpretation of contingent management. 146 F.3d 948, 954 (D.C. Cir. 1998). The court, however, rather glibly dismissed a Step One analysis under *Chevron* stating that "Congress has not spoken to the issue of conditional exemptions. . . ." *Id.* at 958. Under its Step Two analysis, the court found that EPA's reading was "a permissible construction of the statute," but the court did so without confronting the more significant concerns with contingent management discussed above. *Id.*

148 E.g., Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990); Steven Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

149 E.g., Gellhorn and Verkuil, *supra* note 145; Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463 (1999); Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 574 (1997).

150 See generally Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994).

151 The Fourth Circuit, in *Brown & Williamson v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998), stated, in the context of a discussion of *Chevron*, that "ascertaining congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction." See also Gellhorn and Verkuil, *supra* 145; see, e.g., *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973), that federal agencies "may not bootstrap [themselves] into an area in which [they] have no jurisdiction"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

152 Bernard Schwartz has noted that "the Supreme Court has not ruled directly on the relationship between *Chevron* and jurisdiction. . . ." Schwartz, *supra* note 149, at 574, but he has also noted that several Justices have indicated that *Chevron* deference applies to interpretations of agency jurisdiction. *Id.* Justices Scalia and Brennan expressed differing views of the propriety of *Chevron* deference on jurisdictional issues. *Compare* *Miss. Power and Light Co. v. Mississippi*, 487 U.S. 354, 377

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One of the criticisms of a special rule for jurisdictional interpretations is the difficulty of distinguishing jurisdictional from non-jurisdictional issues.¹⁵³ That difficulty is reflected in the issue of contingent management. Contingent management can be seen as an interpretation of existing listing criteria or as a more significant issue involving the scope of EPA's jurisdiction under Subtitle C and Subtitle D.

Additionally, concerns about jurisdictional deference typically arise in the context of agency attempts to expand the area of its traditional authority. In one sense, contingent management reflects an expansion of EPA authority by imposing contingent restrictions on non-hazardous wastes not otherwise subject to federal regulation under RCRA. More properly, however, contingent management can be seen as an attempt by EPA to restrict the jurisdictional reach of Subtitle C of RCRA. Even in areas where an agency is restricting its authority, caution in deference may be warranted.¹⁵⁴ In either view, EPA is defining the boundaries of jurisdiction under RCRA, and contingent management can be seen as an agency attempt to frustrate a congressionally crafted distinction between regulation of non-hazardous and hazardous wastes. EPA is using contingent management to avoid the consequences of these distinctions.¹⁵⁵

Although the applicability of *Chevron* may be ambiguous, one thing is clear. The significance of contingent management warrants a searching and independent assessment by the courts. Whether in the guise of a Step One or

(1988) (Scalia concurring), with *Miss. Power and Light Co. v. Mississippi*, 487 U.S. 354, 383 (1988) (Brennan dissenting).

153 See, e.g., *Miss. Power and Light Co.* 487 U.S. at 354 (Scalia, J., concurring).

154 Professor Sunstein, in an early article on this issue, suggested some limited situations in which deference to agency interpretations of expansive jurisdiction would not be appropriate. He then noted:

It should also follow that agencies will not receive deference when they are denying their authority to deal with a large category of cases. Here too the agency determination is jurisdictional. Here too there is risk of bias, in the form not of self-dealing, but instead of an abdication of enforcement power. Because abdication has been a major legislative fear, and because deference should not contain an antiregulatory bias, *Chevron* should be inapplicable here as well.

Sunstein, *supra* note 150, at 2100 (citations omitted).

155 There are other reasons to question the scope of *Chevron* deference in the context of contingent management. At least one commentator has raised concerns about the effect of *Chevron* deference on the power of special interests to influence administrative action. See Cass R. Sunstein, *Deregulation and the Courts*, 5 J. POL'Y & MGMT. 517 (1986). EPA's attempts to develop alternative regulatory mechanisms, reflected in development of contingent management, can be seen as a response to pressure applied by particular industries attempting to avoid the costs and stigmas of hazardous waste regulation. Agencies must, of course, be responsive to issues relevant to particular segments of the regulated community. But the risk of improper political manipulation of agency decisions seems particularly high given a mechanism, such as contingent management, that allows the agency to avoid otherwise applicable statutory requirements through an open-ended claim of authority. This risk is also of particular relevance in light of the history of congressional concerns with the exercise of discretion by EPA under RCRA. See *supra* notes 138-139 and accompanying text.

Step Two *Chevron* analysis or through a conclusion that *Chevron* deference is unwarranted, reviewing courts should engage in a full inquiry into the legitimacy of contingent management under RCRA. In the absence of the crutch of *Chevron* deference, EPA's position on the legality of contingent management is weak.

Nonetheless, as evidenced by the court's approach in *Military Toxics Project v. EPA*, it is possible that courts will view contingent management as a simple application of EPA's discretion to regulate hazardous wastes. Thus, if there is an arguable (if not compelling) case for contingent management authority, *Chevron* deference may lead courts to uphold the contingent management approach.

VI. Rationalizing the Problem of "Not Very Hazardous" Waste

EPA's use of contingent management is of doubtful legality, but even if ultimately upheld by courts, it creates problems of enforcement and, frankly, of public perception. It is a bootstrap attempt to avoid using the regulatory mechanisms under Subtitle C that Congress has developed. Ultimately, EPA's use of contingent management is tricky, possibly unlawful, and certainly unnecessary. EPA can accomplish its legitimate objectives of tailored regulation and minimized stigma through a more rational application of a Subtitle C Minus approach. Alternatively, a statutory change to authorize federal enforcement under Subtitle D would ameliorate virtually all of the concerns of EPA and the regulated community without resorting to contingent management.

A. *Regulation under Subtitle C: Doing Better than C Minus*

Until Congress amends RCRA, Subtitle C is the best statutory vehicle to develop a rational system of tailored management standards that addresses the problems of classification and stigma.

A rational approach would have a series of elements. First, EPA should formally adopt distinct classes of hazardous waste. In addition to the current, if unused, distinction between hazardous waste and recyclable materials, EPA should formally designate a class of special wastes that would be subject to reduced regulatory requirements. Second, EPA should promulgate specific regulatory criteria to be used in determining which hazardous wastes should be classified as special wastes. Third, EPA should clearly establish separate regulatory programs for these classes of wastes. The class of wastes labeled "hazardous wastes" should be subject to Full Subtitle C regulation, as it is now. The class labeled "recyclable materials" should be regulated under the special management standards contained in 40 C.F.R. Part 266, as is

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largely the case now. The newly designated class of “special wastes” should be subject to tailored regulatory requirements generally contained in a new 40 C.F.R. Part 267. Finally, EPA should consistently use the waste classification nomenclature.

1. Distinct Waste Classifications

Regulatory jurisdiction, for purposes of Subtitle C, is all-or-nothing. Only materials that are classified as hazardous waste are subject to Subtitle C regulation and enforcement.¹⁵⁶ Thus, any material that is to be subject to regulation must meet the statutory and regulatory definition of hazardous waste.

Nothing, however, prevents EPA from formally establishing distinct subclasses of materials that otherwise meet the general definition of hazardous waste. EPA does that now. For example, management standards applicable to small quantity generators vary depending on whether the waste is classified as an “acute hazardous waste” or a “hazardous waste.” EPA regulations distinguish, by name and by regulatory standards, the class of hazardous waste that its regulations label “recyclable materials.” EPA also previously proposed a class of what it called special wastes that consisted of certain “low toxicity/high volume” wastes.¹⁵⁷

It would be no remarkable stretch of EPA’s authority to formally establish three distinct subclasses of materials within the overall class of hazardous waste. EPA already purports to define “hazardous waste” and “recyclable materials.” It would need only to define a new class of “special wastes” for which a set of tailored regulations is appropriate. Separate designation, and consistent use, of these labels would provide greater clarity regarding the regulatory requirements applicable to the materials, and, as discussed below, might minimize some of the concerns with stigma.

2. Promulgation of Criteria for Classification as Special Wastes

Perhaps the greatest concern with development of reduced hazardous

¹⁵⁶ This is not quite accurate. Congress has given EPA regulatory and enforcement authority over non-hazardous recycled used oil. 42 U.S.C. § 6924 (2000). Congress has also given EPA specific regulatory and enforcement authority over “hazardous household waste” and hazardous waste from conditionally exempt small quantity generators that are not otherwise subject to Subtitle C requirements. 42 U.S.C. § 6945(c)(2) (2000).

¹⁵⁷ See *supra* notes 51-54 and accompanying text. In essence, this article puts forward a recommendation that EPA resurrect the concept of special wastes that generated such “widespread and divergent protest from both the regulated community and the public.” 45 Fed. Reg. 33,174 (1980). Twenty years have now passed, and it may be time for the establishment, under suitable constraints, of a category of special wastes that are to be subject to tailored regulations.

waste requirements arises from the uncertain scope of EPA's discretion to apply such standards. In the context of contingent management, EPA apparently refers to its largely unfettered discretion to "balance" listing criteria in determining whether to regulate a material as a hazardous waste. EPA has not, however, provided a consistent statement of the factors it will use to determine when to adopt reduced regulatory requirements. For purposes of public policy, judicial review, and potentially, constitutional authority, EPA should not rely, however, on a case-by-case approach to developing tailored regulations, but should promulgate the criteria it will use to make these determinations. Given EPA's general authority to adopt Subtitle C requirements "as necessary to protect human health and the environment,"¹⁵⁸ and given a requirement that special wastes satisfy mandatory statutory requirements, EPA should be able to develop a set of criteria for identifying wastes that do not need full Subtitle C treatment. Such criteria might include factors relating to toxicity, stigma, and possibly cost, at least as reflected in an assessment of whether more costly regulation is needed to protect public health and the environment.

3. Separate Management Standards in Separate Parts of the Code of Federal Regulations

EPA should clearly establish separate regulatory programs for these classes of wastes. EPA has already essentially established a distinct set of full Subtitle C requirements applicable to most hazardous wastes. It has also developed a reduced set of requirements applicable to recyclable materials largely codified at 40 C.F.R. Part 266. The newly designated class of special wastes should be subject to tailored regulatory requirements generally contained in a new 40 C.F.R. Part 267. As a critical element of any tailored special waste requirements, EPA would be limited to the adoption of standards that meet the minimum requirements of RCRA, including land disposal requirements. This will also limit EPA's authority to authorize land disposal of such special wastes in facilities that do not meet minimum Subtitle C requirements.¹⁵⁹

The significance of the placement of these standards in a new Part 267 should not be minimized. RCRA requirements are inherently complex. But few things are more frustrating than finding that this inherent complexity has been increased by the irrational structure of EPA's regulations. Who would guess that EPA's exclusion from regulation of products produced from

¹⁵⁸ See *supra* note 58 and accompanying text.

¹⁵⁹ See *supra* notes 59-62 and accompanying text for a discussion of minimum Subtitle C requirements.

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recycled hazardous waste would be located as a parenthetical phrase in a provision defining hazardous waste?¹⁶⁰ Why would EPA place its exclusion of facilities that recycle waste without storage as a subsection in Part 261? Understanding RCRA would be sufficiently trying even without its confusing structure and drafting.

It would be more rational, and certainly more helpful to persons trying to understand and use the regulations, to establish distinct sections identifying the requirements for hazardous wastes, recyclable materials and special wastes. Thus, Parts 264 and 265 would identify management requirements for hazardous wastes. EPA could restrict Part 266 to the separate sets of management standards applicable to different types of recyclable materials. EPA could create a comparable new Part 267 that would contain, as subparts, the sets of management standards applicable to special wastes. This would avoid the haphazard and confusing structure that is currently evolving.¹⁶¹

4. Consistent Use of the Waste Classification Nomenclature

The concern with stigma apparently drives much of EPA's use of contingent management. The "simple" act of deeming a material to be hazardous is thought to produce regulatory disincentives to proper management. EPA, in recognition of this possible stigmatizing effect of labeling, established the label "recyclable materials." However, EPA simply has not used the label. Recyclable materials, for almost all purposes, are called hazardous wastes. If EPA's original intention to develop a less stigmatizing label were applied to special wastes as well as recyclable materials, and, more to the point, if EPA followed through with consistent use of these labels, some of the stigma associated with regulation under Subtitle C might be lessened. For example, a special waste manifest for cement kiln dust might be less alarming than a hazardous waste manifest, even if the level of regulatory control were the same.

5. Enforce Separate Special Waste Requirements Under Subtitle C

If EPA regulated special wastes through separate management standards

160 40 C.F.R. § 261.3(c)(2)(i) (stating in a final parenthetical: "However, materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under this provision unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.").

161 Evolution, it should be noted, does not always produce the most effective and efficient structure. It makes do with alteration of pre-existing structures; it relies on chance and operates from no pre-established plan. See STEVEN JAY GOULD, *THE PANDA'S THUMB* 76-84 (1992). EPA can, however, play God and try to use a little more foresight and design skill.

in a new Part 267, federal enforcement would be the same as that available for any other violation of Subtitle C requirements. Classification of violations under the penalty policy would take into account the gravity and economic benefit of the particular violation. It would not be governed by the potential all-or-nothing approach to violations that may be a consequence of contingent management. This factor alone should give the regulated community incentive to accept a Subtitle C approach to regulation of special wastes.

B. *Amending the Statute*

No single change to RCRA would open more doors to regulatory alternatives than amending § 3008(a) by changing the word “subchapter” to “chapter.”¹⁶² This would allow EPA to enforce the requirements of Subtitle D, including the open dumping prohibition under § 4005(a). EPA could then, through its authority in §§ 1008(a)(3) and 4004(a), establish tailored sanitary landfill requirements for non-hazardous waste and prohibit the open dumping of these wastes in facilities other than those that meet the sanitary landfill criteria. The specific requirements applicable to hazardous wastes would not apply to those wastes managed under Subtitle D.

In addition to a change in the enforcement section, Congress should control the process by establishing the criteria that EPA may use in determining whether to regulate a waste under Subtitle C or D. Thus, Congress could, for example, amend 3001(a) to allow EPA to develop criteria for determining whether a waste should be classified as hazardous for purposes of Subtitle C. In addition to factors relating to inherent toxicity, these might include explicit statutory authority to consider the cost of regulation under Subtitle C, the potential stigmatization effects of regulation under Subtitle C and the effectiveness of regulation under Subtitle D.

Such changes might be agreeable to EPA, the regulated community and environmentalists. EPA would obtain clear authority to adopt enforceable regulations under Subtitle D. This would expand its options when dealing with wastes.¹⁶³ The regulated community would gain a regulatory program but lose the stigma. The environmentalists, already faced with EPA claims of authority to exclude wastes through contingent management, would gain

¹⁶² This would presumably allow EPA to enforce violation of the federal open-dumping prohibition through issuance of compliance orders under § 3008. The same result might be obtained more explicitly by inserting “or violation of section 4005(a)” in 3008(a). Neither of these changes would make a violation of Subtitle D criminally enforceable; that would require amendment of §§ 3008(d) and (e).

¹⁶³ To the extent that this change would also open the door to federal regulation of solid wastes that are not otherwise hazardous, it would constitute a substantial expansion of EPA jurisdiction, and, of course, lessen the possibility of consensus.

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clearer authority for federal enforcement and, if criteria were adopted to distinguish Subtitle C and Subtitle D regulation, some judicial control over EPA's choice of regulatory strategy.

Conclusion

EPA appears hell-bent on imposing tailored regulation on classes of wastes that it determines do not warrant full regulation under Subtitle C. The issues that must be faced include the legal authority for such regulations and, perhaps more importantly, public accountability and control over the choices that EPA makes. The ideal solution is for Congress to address the issue by providing EPA clearer authority and statutory standards for determining tailored regulations. Under RCRA as it currently exists, a Subtitle C Minus approach, coupled with criteria for determining when reduced regulation is warranted, seems to be consistent with the structure of RCRA and more suitable for enforcement. A contingent management approach is bedeviled by legal uncertainty and the smell of expediency. Nonetheless, steps could be taken, through the adoption of specific criteria and a more rational structure to the regulations, to improve this approach under RCRA. A new Congress and a new administration will be faced with interesting choices in rationalizing regulation of "not very hazardous" waste under RCRA.

